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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1194

JERRY J. ENOMOTO, *et al.*,

Petitioners,

v.

JOHN WESLEY CLUTCHETTE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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INDEX

	Page
TABLE OF AUTHORITIES	iii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
I. SAN QUENTIN DISCIPLINARY PROCEEDINGS AT THE TIME THIS ACTION WAS COMMENCED	2
A. Introduction	2
B. Consequences of Disciplinary Proceedings	5
1. Sentence to isolation	5
2. Confinement to the Adjustment Center or Segregation	5
3. Referral to the Adult Authority regarding parole consideration	5
4. Assessment of damages or forfeiture of earnings	7
5. Referral to the district attorney for criminal prosecution	8
C. Procedures used at San Quentin to adjudicate disciplinary offenses	9
1. Notice	9
2. Impartial tribunal	11
3. Counsel or Counsel-substitute	12
4. Witnesses	12
5. Confrontation and cross-examination	13
6. Decision based on the evidence adduced at the hearing	13
7. Statement of evidence relied on and reasons for disposition	14
8. Procedures in cases involving conduct that also constitutes a crime	14
II. DEVELOPMENTS SINCE THE DISTRICT COURT'S DECISION	16

Page

SUMMARY OF ARGUMENT 20

ARGUMENT 27

Introduction 27

1. Wolff is distinguishable on its facts 29

2. Wolff is not definitive as to due process in other cases 31

I. THE COURT OF APPEALS CORRECTLY HELD THAT SPECIAL PRECAUTIONS ARE REQUIRED FOR DISCIPLINARY HEARINGS WHEN THE MISCONDUCT CHARGED CAN ALSO BE PROSECUTED AS A CRIME 33

A. Counsel 48

B. Use Immunity 54

II. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT ACCUSED PRISONERS HAVE THE RIGHT TO CALL WITNESSES ON THEIR OWN BEHALF, SUBJECT TO REASONABLE RESTRICTIONS 58

III. THE COURT OF APPEALS PROPERLY REQUIRED THAT WHEN PRISON OFFICIALS DETERMINE TO DENY THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION IN AN INDIVIDUAL CASE, THEY MUST STATE THE REASON OR REASONS THEREFOR AND THAT SUCH REASONS MUST REASONABLY RELATE TO THE NEEDS OF PRISON SECURITY 62

IV. THE COURT OF APPEALS PROPERLY REQUIRED THE PRISON OFFICIALS TO BASE THEIR DECISIONS IN DISCIPLINARY HEARINGS ON THE EVIDENCE PRESENTED AT THE HEARINGS 75

CONCLUSION 78

TABLE OF AUTHORITIES

Cases *Page*

Abermarle Paper Co. v. Moody, __U.S.__, 95 S.Ct. 2362 (1975) 28

Adams v. Maryland, 347 U.S. 179 (1954) 56

Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975) petition for cert. pending, No. 75-35 ..... 62, 64

Alyeska Pipeline Service Co. v. Wilderness Society, __U.S.__, 95 S.Ct. 1612 (1975) 32

Armstrong v. Manzo, 380 U.S. 545 (1965) 59

Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975) ..... *passim*

Barber v. Page, 390 U.S. 719 (1968) 70

Barrows v. Hogan, 379 F.Supp. 314 (M.D.Pa. 1974) 37

Baxter v. Palmigiano, No. 74-1187 67

Berger v. California, 393 U.S. 314 (1969) 67, 70

Blyden v. Hogan, 320 F.Supp. 513 (S.D.N.Y. 1970) 35

Brady v. United States, 397 U.S. 742 (1970) 42

Breed v. Jones __U.S.__, 95 S.Ct. 1779 (1975) 37

Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971) 67

Brown v. United States, 411 U.S. 223 (1973) 55

Bundy v. Cannon, 328 F.Supp. 165 (D.Md. 1971) 11

Byers v. Justice Court, 71 C.2d 1039, 458 P.2d 465 (1969) rev'd on other grounds sub nom California v. Byers, 402 U.S. 424 (1971) 56

Campbell v. Rodgers, 1 Prison Law Rptr. 99 (D.D.C. 1972) 52

Carter v. McGinnis, 351 F.Supp. 787 (W.D.N.Y. 1972) 36, 39, 55, 58

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 42

Page

Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), on rehearing, 510 F.2d 616 (9th Cir. 1974), affg 328 F.Supp. 767 (N.D. Cal. 1971) ..... *passim*

Collins v. Hancock, 354 F.Supp. 1253 (D.N.H.1973) 11

Crampton v. Ohio, 402 U.S. 183 (1971) 41

Daigle v. Hall, 387 F.Supp. 652 (D. Mass. 1975) 63

Davis v. Alaska, 415 U.S. 308 (1974) 66

DeVita v. Sills, 422 F.2d 1172 (3d Cir. 1970) 43

Duncan v. Louisiana, 391 U.S. 145 (1968) 4

Fowler v. Vincent, 366 F.Supp. 1224 (S.D.N.Y. 1973) 39, 55, 57

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 49, 63, 67, 74

Garrity v. New Jersey, 385 U.S. 493 (1967) 38, 40, 43, 55

Gee v. Brown, 14 C.3d 470, 536 P.2d 1017 (1975) 49, 74

German v. Schmidt, 330 F.Supp. 480 (W.D.Wis. 1971) 8

Goldberg v. Kelly, 397 U.S. 254 (1970) 52, 59, 66, 67, 75

Graham v. State Department of Correction, 392 F.Supp. 1262 (W.D.N.C. 1975) 62

Greene v. McElroy, 360 U.S. 474 (1959) 67, 75

Griffin v. California, 380 U.S. 609 (1965) 38, 40

Haines v. Kerner, 404 U.S. 519 (1972) 46

Inmate 24394 v. Schoen, 363 F.Supp. 683 (D.Minn. 1973) 52

In re McLain, 55 C.2d 78 (1960) 6, 66

In re Prewitt, 8 C.3d 479 503 P.2d 1326 (1972) .. 6, 49, 73, 77

Johnson v. Avery, 393 U.S. 483 (1969) 50

Jones v. Manson, 393 F.Supp. 1016 (D.Conn. 1975) .. 39, 54, 57

Kastigar v. United States, 406 U.S. 441 (1972) 40, 55, 57

Page

Kent v. United States, 383 U.S. 541 (1966) 70

Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966) 72

Landman v. Royster, 333 F.Supp. 621 (E.D.Va. 1971) 52, 59, 76

Lefkowitz v. Turley, 414 U.S. 70 (1973) ..... *passim*

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 8

Malloy v. Hogan, 378 U.S.1 (1964) 38, 43

Maness v. Meyers, 417 U.S. 449 (1975) 40, 51, 55, 56, 57

Mathis v. United States, 391 U.S.1 (1968) 35

McConnell v. Rhay, 393 U.S.2 (1968) 50

Melson v. Sard, 402 F.2d 653 (D.C.Cir. 1968) 39, 55

Michigan v. Tucker, 417 U.S. 433 (1974) 36, 48

Miranda v. Arizona, 384 U.S. 346 (1966) ..... *passim*

Morrissey v. Brewer, 408 U.S. 471 (1972) .. 31, 49, 66, 67, 74

Murphy v. Waterfront Commission, 378 U.S. 52 (1964) 55, 56

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937) 76

Palmigiano v. Baxter, 487 F.2d 1280, on rehearing, 510 F.2d 534 (1st Cir. 1974) 35, 39, 54

Pearson v. Townsend, 362 F.Supp. 207 (D.S.C. 1973) 52

People v. Coleman, 13 C.3d 867, 533 P.2d 1024 (1975) 39, 41, 44, 55

People v. Dorado, 62 C.2d 338, 398 P.2d 361 (1965) 34

Pointer v. Texas, 380 U.S.400 (1965) 67

Powell v. Alabama, 287 U.S. 45 (1932) 50

Preiser v. Rodriquez, 411 U.S. 475 (1973) 7

Page

Roberts v. Taylor, 390 F.Supp. 705 (D.R.I. 1975) . . . 39, 52, 54

Sands v. Wainwright, 357 F.Supp. 1062 (M.D.Fla.) rev'd on procedural grounds, 491 F.2d 417 (5th Cir. 1973) 36, 39, 43, 55

Shimabuku v. Britton, 503 F.2d, 38 (10th Cir. 1974) 54

Simmons v. United States, 390 U.S. 377 (1968) . 38, 40, 55, 56

Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 38

Specht v. Patterson, 386 U.S. 605 (1967) 66

Spevack v. Klein, 385 U.S. 511 (1967) 38, 47

Turley v. Lefkowitz, 342 F.Supp. 544 (W.D.N.Y. 1972) 47

Uniformed Sanitationmen v. Commissioner, 392 U.S. 280 (1968) 38, 47

Uniformed Sanitationmen v. Commissioner, 426 F.2d 619 (2d Cir. 1970) 56, 57

United States v. Abilene & S.Ry., 265 U.S. 274 (1924) 76

United States v. Ash, 413 U.S. 300 (1973) 51, 57

United States v. Cordova, 414 F.2d 277 (5th Cir. 1969) 37

United States v. Kordel, 397 U.S.1 (1970) 42

United States v. Soloman, 509 F.2d 863 (2d Cir. 1975) 42

United States v. Wade, 383 U.S. 218 (1967) 51

Walker v. Hughes, 386 F.Supp. 32 (E.D.Mich. 1974) . . . 63, 71

Wolff v. McDonnell, 418 U.S. 539 (1974) . . . . . *passim*

Statutes

42 U.S.C. §1983 8

Page

California Penal Code

§1168 5

§3020 5

§4500 8

§5077 5

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QUESTIONS PRESENTED

The district court and the Court of Appeals determined—and it is not contested in this Court—that the consequences of disciplinary proceedings at San Quentin are sufficiently serious to require procedural due process safeguards against error or arbitrariness, and that San Quentin's disciplinary fact-finding procedures in effect when this action was brought did not comply

with rudimentary due process. The questions presented to this Court are:

1. Whether a prisoner accused of misconduct that also constitutes a crime, and whose case may be referred to the District Attorney for criminal prosecution, may be subjected to severe disciplinary punishment without a hearing that protects his Fifth Amendment privilege against self-incrimination.

2. Whether the Court of Appeals erred in its determination that accused prisoners have the right to call witnesses on their own behalf, subject to reasonable restrictions.

3. Whether the Court of Appeals erred in holding that when the prison officials determine to deny the right of confrontation and cross-examination to a prisoner, they must state the reason or reasons therefor and that such reasons must reasonably relate to the needs of prison security.

4. Whether the Court of Appeals properly required the prison officials to base their decisions in disciplinary hearings on the evidence presented at such hearings.

STATEMENT OF THE CASE

I.

SAN QUENTIN DISCIPLINARY PROCEEDINGS AT THE TIME THIS ACTION WAS COMMENCED.

A. Introduction

The district court made detailed findings of fact

(A155-166),[1] establishing that the consequences of disciplinary proceedings at San Quentin at the time this action was commenced were sufficiently serious to require procedural safeguards against error or arbitrariness. The prison officials–petitioners in this Court–discuss in their brief only the disciplinary proceedings in the case of individual plaintiff Clutchette. They state only the officials' version of the incident and conclude that Clutchette suffered only minor changes in his status–transfer to isolation, loss of several privileges and referral to the District Attorney for possible prosecution–as a result of the proceedings.[2] As to the underlying incident, petitioners overlook Clutchette's detailed affidavit (plaintiffs' Exhibit 1, introduced in evidence at A94), setting forth a very different version of what actually happened–a version establishing plaintiff's innocence of the charge. It is quite misleading for petitioners to state only the officials' side of the story, because the district court expressly declined "to pass on the truth or veracity of the allegations" contained in the officials' reports or to make any finding on "the questions of guilt or innocence" (A92,93). Respondents–the plaintiffs in the district

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[1]Citations to "A" refer to pages of the Single Appendix in this Court.

[2]The prison administrator's testimony was actually as follows:

"Q. What punishment did you impose on Clutchette?

"A. Well, there was–referred to the District Attorney, 29 days isolation, 29 days cell status and a 60 days loss of privilege. . . ." (A52).

court—were prepared to offer proof as to the underlying disciplinary incident, but since the court was concerned not with the facts of the incident but with the disciplinary *procedures*, there was no evidence taken and no finding as to what Clutchette did or did not do to merit disciplinary punishment (e.g. A93-94).

Moreover, petitioners' narrow focus on Clutchette's individual case disregards the crucial considerations that (1) this has been maintained as a class action involving punishments that may be imposed on *all* San Quentin prisoners regardless of their status; (2) in judging what procedural safeguards are appropriate, it is the possible range of punishments that must be considered, and not simply the punishment imposed in a particular case;[3] and (3) there is undisputed evidence of extremely serious disciplinary consequences befalling other San Quentin prisoners (see R288, 326, 352, 362-376).[4] Accordingly, it is important to consider the range of serious punishments that San Quentin prisoners may be subjected to when they are found guilty of a serious infraction. As the district court found, the most serious disciplinary punishments following a finding of guilt of some prison infraction are (1) sentence to isolation, (2) confinement to the Adjustment Center or segregation, (3) referral to the Adult Authority regarding the prisoner's parole, (4) assessment of damages or forfeiture of earnings, and (5) referral to the District Attorney for criminal prosecution.[5]

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[3]Cf. *Duncan v. Louisiana*, 391 U.S. 145, 159-60 (1968).

[4]Citations to "R" refer to pages of the record and supplemental record before this Court.

[5]There is no legislative sanction for these punishments, unlike the situation in *Wolff v. McDonnell*, 418 U.S. 539, 545, n.5 (1974). These are punishments that California officials have created on their own, without express warrant by elected representatives.

B. Consequences of Disciplinary Proceedings

1. *Sentence to isolation.*

Isolation is a form of solitary confinement. The prisoner is transferred from the general prison population to an extremely restrictive form of confinement that cuts him off from all prison programs and other prisoners. The harsh conditions of life in isolation are described in detail in the district court's findings (A161-162).

2. *Confinement to the Adjustment Center or Segregation.*

Although confinement to isolation could not exceed 30 days, confinement to the "Adjustment Center" or segregation could be *indefinite*. Indeed, as a prison administrator testified, and as the district court found, a prisoner could remain there for the duration of his sentence (A73, 162-63). Again, such confinement operates to isolate the prisoner from all prison programs and meaningful contact with other prisoners. The conditions of life in the Adjustment Center or segregation are described in factual detail by the district court (A162-64).

3. *Referral to the Adult Authority regarding parole consideration.*

Under California's indeterminate sentence law (Cal. Penal Code §§1168, 3020 and 5077), criminal offenses

carry statutorily prescribed minimum and maximum prison terms. Judges merely sentence convicted persons to "the term prescribed by law." The actual time served is determined by the California Adult Authority (A164-65). Each year, a prisoner's case is considered by the Adult Authority, which may postpone the case for another year, set a maximum sentence or set a parole release date (A165).

A Resolution of the Adult Authority requires that a report of all disciplinary actions be presented to the Authority at the time it makes its annual decision whether to set the term of a prisoner's sentence and grant parole (A165, 58, 74). As the district court found, a prisoner's behavior in prison is a key factor in the Authority's decision-making process (A165). A serious disciplinary infraction, especially one involving violence, will obviously affect the Adult Authority's determination and result at least in a year postponement, if not in a longer fixed term of incarceration. The record here shows denials of parole because of disciplinary incidents (R328, 332).

In addition, if the prisoner is found guilty of a disciplinary offense occurring after the Adult Authority has set a sentence or parole date, the offense must be reported to the Authority for immediate action (A165-66). The disciplinary committee is authorized to recommend that the Authority rescind the parole date (A166,58-59).[6] Recommending against a parole date is

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[6]The California Supreme Court has held that a single disciplinary offense is sufficient cause for the Adult Authority to rescind its parole release order and reset the prisoner's sentence at the statutory maximum. *In re McLain*, 55 Cal.2d 78,357 P.2d 1080(1960); see also *In re Prewitt*, 8 Cal.3d 470,503 P.2d 1326 (1972)

probably the most serious disciplinary punishment (A58-59).[7]

4. *Assessment of damages or forfeiture of earnings.*

Another of the sanctions that the disciplinary committee could impose is to levy upon the meager earnings of a prisoner to pay the cost of any property damage. The committee could also recommend that a prisoner's future prison wages be forfeited, regardless of whether there is any property damage. The latter sanction is, in effect, a fine (A166). The San Quentin Institution Plan permits assessments for amounts up to $100 by a hearing officer acting alone (ID-III-08), while the disciplinary committee is authorized to impose assessments in excess of that amount and, in effect, to garnishee the prisoner's future earnings to cover the assessment (ID-II-06). These actions can cause a prisoner great hardship. Even if the amount of the assessment would be relatively small for an employed person in the free world, it leaves the prisoner totally without funds to purchase necessaries from the prison

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[7]Respondents in this case have not challenged "the very fact or duration" of their custody and have not sought "immediate or more speedy release," so *Preiser v. Rodriquez*, 411 U.S. 475 (1973), does not apply. See *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Respondents do not seek restoration of any good time credits (there are none in California) and do not seek immediate or earlier parole. Respondents merely seek a declaratory judgment and an "injunction enjoining the prospective enforcement of invalid prison regulations." *Wolff, supra.*

canteen like toilet articles, tobacco, candy, paper, postage stamps, writing materials, etc. (R328).[8]

5. Referral to the district attorney for criminal prosecution.

Many disciplinary offenses also constitute crimes. For example, the disciplinary committee adjudicates cases of assault, possession of weapons, drug offenses, and even homicide, all of which can be criminally prosecuted (see, e.g. R288, 326-78, 362-76). On the basis of its findings, the disciplinary committee may refer the case to the District Attorney for prosecution (A157, 167-168).[9] The special procedures used at San Quentin in disciplinary proceedings involving conduct that could also be criminally prosecuted are described *infra* at pp. 14-16.

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[8]The Court in *Wolff v. McDonnell* recognized that due process is required not only when the government seeks to deprive a person of liberty but also when property interests are at stake. 418 U.S. at 557-58. Levying on a prisoner's account without due process would impermissibly deprive the prisoner of his property. See *German v. Schmidt*, 330 F.Supp. 480 (W.D. Wis. 1971). Deprivation of a property right is of course remediable under 42 U.S.C. §1983. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

[9]The penalties for in-prison assaultive crime are very severe. For example, assault with a deadly weapon carries a life sentence (without possibility of parole for 9 years). Cal. Penal Code §4500. Assault on an officer resulting in death is a capital crime. *Id.*

C. Procedures used at San Quentin to adjudicate disciplinary offenses.

The San Quentin Institution Plan in effect when this case was brought spoke in terms of "Disciplinary Hearing Courts," "charges," "pleas," and "adjudication," but mandated none of the procedures traditionally regarded as essential to fair and reliable fact-finding. The disciplinary process was succinctly summarized by the Court of Appeals:

> "Under the disciplinary procedures existing at the time of commencement of this lawsuit, an accused inmate was visited by a hearing officer within 24 hours of an alleged infraction. The officer orally informed the prisoner of the charges against him. The officer could impose sanctions for minor infractions without any further investigation or hearing, but serious offenses were referred to a disciplinary committee. At the committee hearing, the complaint and, in some cases, a summary of supplemental reports were read to the inmate (but not shown to him), and he was then given an opportunity to explain his conduct. The decision of the committee was recorded and forwarded to an associate warden for approval." *Clutchette v. Procunier*, 497 F.2d 809, 815 (9th Cir. 1974).

The district court made detailed findings of fact regarding how the disciplinary procedures worked in practice. The court considered the presence or absence of the following components of rudimentary due process:

1. *Notice.*

The only notice given San Quentin prisoners accused of a disciplinary offense did not fairly inform them of

the specific misconduct with which they were charged and thus did not permit preparation of a defense. The accused was given a simple "notice of complaint", but all it included was the number and title of the general *rule* the prisoner was charged with having violated; it did not describe the actual conduct charged or the particular facts to be proved (A178). Thus, it only stated something like "D1201, Inmate Behavior" or "D1202, Disobeying Order," without explication.[10] There were no allegations of the act or behavior considered to violate some broad general rule (A156).

Although no adequate notice was given to the prisoner, the officer reporting the disciplinary offense was required to specify the facts in writing on a prison Form CDC-115. The Form 115 might be supplemented by additional reports, but these were not required. Despite the preparation of the Form 115 and any additional reports, accused prisoners were not permitted to see them (A155). The officials offered no evidence as to why the Form 115 and any supplemental reports could not be given to the accused prisoner so that he would have adequate notice of the charges against him.[11]

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[10]A prison administrator testified that the notice of complaint stated "exactly what the charge is" (A34). But, as the notice in evidence (court's exhibit 2) shows, he referred only to "the number of the Director's rule and then what the title is" (A35), not the facts of the alleged offense. The district court properly found that the only notice given was the uninformative number and general title (A156).

[11]It is the *current* practice at San Quentin routinely to provide accused prisoners with the Form 115 and with any "non-confidential" supplemental reports. (R296, Rule DP-4503(2)).

2. *Impartial tribunal.*

The San Quentin disciplinary committee was (and is) composed solely of prison officers. The disciplinary procedures in effect when this case was heard did not preclude the officer accusing the prisoner from sitting on the disciplinary committee (A157). Although a prison administrator acknowledged that this was undesirable, it in fact occurred in plaintiff Clutchette's case, when a lieutenant whose report was a part of the evidence also sat on the disciplinary committee and when an associate warden, whose report was also part of the evidence, was both consulted as to the proper disposition and then "reviewed" and approved the disposition (A28,42,43,51,74-75,114).[12]

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[12]It is doubtful that a tribunal composed only of prison officers can really be an impartial trier of fact, at least in a serious disciplinary case. But there is no contention in this action that at least one "outside" hearing officer must be used, as several courts have required. See, e.g. *Collins v. Hancock*, 354 F.Supp. 1253 (D.N.H. 1973); *Bundy v. Cannon*, 328 F.Supp. 165 (D.Md. 1971); *Avant v. Clifford*, 67 N.J.496,341 A.2d 629, 646 (1975). Compare *Wolff v. McDonnell*, 418 U.S. at 571, where the Court found no warrant "in the record presented here" for a holding that the tribunal could not be impartial.

Judge Friendly has persuasively argued that if the tribunal is truly unbiased (a safeguard he considers of the highest priority), other procedural safeguards might properly be more relaxed; thus, "agencies might be offered an option of less procedural formality if the decisionmaker were not a member of the agency and of still less if . . . he were not a full-time government employee at all. . . . [A] better answer may not be more insistence on adversary proceedings but less reliance on the bureaucracy for decisionmaking." Friendly, "*Some Kind of Hearing,*" 123 U.Pa.L.Rev. 1267, 1279-80 (1975). Under this reasoning, San Quentin's insistence on a tribunal consisting solely of officers at the prison requires other more rigorous safeguards.

3. *Counsel or Counsel-substitute.*

Regardless of the seriousness of the disciplinary offense or the punishment to be imposed, and regardless of the accused prisoner's lack of literacy, intelligence or ability to speak English, the prisoner was not permitted assistance of any kind at or before the hearing. He could not have a lawyer, a staff member, a law student or any other counsel-substitute help him in preparing a defense or defending himself at the hearing. This was true even though many prisoners accused of disciplinary offenses were (and are) placed in isolation for the entire period between the time of the alleged offense and the hearing, thus rendering it impossible to prepare any defense without the assistance of someone else (A155).[13] Prisoners who happened to have retained or volunteer counsel were not permitted to have their assistance (A158).[14]

4. *Witnesses.*

At San Quentin, the "evidence" in disciplinary hearings consisted solely of written reports (A158). The

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[13]Petitioners' assertion that prisoners are allowed to present written statements from "other inmates, correctional officers, or civilian witnesses" (Brief for Petitioners, p. 10) is pure fancy in a serious disciplinary case, for there is no method by which a prisoner in isolation has access to such persons or can prepare witness statements.

[14]Plaintiff Clutchette's attorney requested that he be permitted to attend the hearing, to present a civilian witness and to defend Clutchette at the hearing, but the request was flatly denied by the officials (R15,16; A121-22).

complaining guard was not even required to be present at the hearing, much less testify or be cross-examined. Nor could the accused call any favorable witnesses, whether they were fellow prisoners, officers, or civilian witnesses (A38).[15]

5. *Confrontation and cross-examination.*

Because the proceedings were conducted solely on the basis of written reports, there was no opportunity for confrontation or questioning of the prisoner's accuser (A158). Indeed, since the complaining guard did not even appear at the hearing, there was not even an opportunity for the disciplinary committee to question him, appraise his credibility or ascertain his opportunity to see, hear or perceive the events.

6. *Decision based on the evidence adduced at the hearing.*

At San Quentin, the disciplinary committee was not prohibited from considering evidence outside the record (A158). A prison administrator testified that he felt free to take into account *ex parte* information casually "passed on" by other prisoners (A39); and guards could also be consulted off the record (A108). Moreover, the

[15]This is true even when a prisoner was accused of a criminal offense and exercised his right to remain silent. (A113,115). Plaintiff Clutchette asked to call the complaining guard as a *favorable* witness, but this was refused (A115).

disciplinary committee was not bound by any standard of proof in determining whether to make a finding of guilt (A159).

7. *Statement of evidence relied on and reasons for disposition.*

The only record of a San Quentin disciplinary proceeding consisted of the notations made on the face of the CDC Form 115 (A159). This included simply the title of the rule violated, the name of the complaining guard, the prisoner's plea (guilty or not guilty), the committee's finding and the punishment ordered. There was no statement of the evidence relied on or reasons for the disposition. Moreover, as noted above, the Form 115 was not even furnished to the prisoner (A158).

8. *Procedures in cases involving conduct that also constitutes a crime.*

As pointed out above, in cases in which the prisoner's misconduct also constituted a crime, one of the consequences of a disciplinary proceeding was referral to the District Attorney for criminal prosecution. In such cases, the accused prisoner was brought before the disciplinary committee and advised of his "*Miranda*" rights.[16] He was specifically advised of his right to remain silent and to have an attorney present

[16] See *Miranda v. Arizona*, 384 U.S. 346 (1966).

during interrogation.[17] He was also advised that anything he said "can and will" be used against him in a court of law (A157). However, if he then requested an attorney as suggested by the *Miranda* warnings (as plaintiff Clutchette did), he was told that this was not permitted until the district attorney interviewed him. If he felt he should speak, he would be questioned about the offense.[18] If he exercised his right to remain silent,

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[17]Counsel for petitioners assert that the prisoner in this situation is "given an opportunity to respond" but "is *not questioned*" (Brief for Petitioners, p. 22). They are mistaken. The San Quentin Disciplinary Plan in effect at the time this case was brought required the *Miranda* warnings for "interrogations" and specified that

> When an inmate becomes or is suspect in the commission of a felony, he must be specifically advised of his Civil Rights before any *questioning* may take place. This condition will apply prior to each time a felony suspect is *questioned about the crime*, either *by* individual interrogators, *Hearing Court Officers*, or *Disciplinary Sub-Committee members*." (ID-III-07) (emphasis added).

The form used in disciplinary hearings involving crimes advised the accused of rights *"while you are being questioned"* (Court's exhibit 4, A47). A prison administrator testified as follows regarding such proceedings:

> "Q. Do you interrogate the inmates at a disciplinary hearing, or do you allow them to make a statement?
>
> "A. At the hearing you can do both. But I would say you start out first by allowing him to state the situation. Then if you have any other questions, then you would ask him." (A110).

Thus, although the committee might not ask questions once the prisoner had insisted on remaining silent (A113), it is clear that otherwise they would seek to interrogate him regarding the alleged crime.

[18]See note 17, *supra*.

the committee nevertheless proceeded to adjudicate the disciplinary infraction, relying solely on the written reports filed against him and hearing no witnesses, favorable or adverse, and no defense (A157).

II.

DEVELOPMENTS SINCE THE DISTRICT COURT'S DECISION

The district court stayed all relief except the requirement that the prison officials submit a new Plan for the conduct of disciplinary committee hearings at San Quentin. In 1971, the officials submitted a new and different disciplinary Plan to the district court and claimed that the Plan met the requirements of that court's decision. Amended Plans were filed in 1972. After remand by the Ninth Circuit, a Second Amended Plan was submitted to the district court on January 17, 1975 (R293). Respondents have taken discovery, submitted new evidence and objected to certain aspects of the latest Plan, but the district court has not yet ruled thereon. None of the new plans was in the record before the Ninth Circuit (see 497 F.2d at 817, n.11). Thus, neither the district court nor the Court of Appeals has passed on any aspect of the Plans under which San Quentin proceedings have been conducted for over three years.[19]

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[19]The California officials summarized the "main differences" between the former disciplinary proceedings condemned by the courts below and their new plans, as follows:

> "While procedures cover several single-spaced pages, here are the main differences between the new regulations and those which were in effect in the past:

The officials voluntarily *implemented* a new disciplinary Plan shortly after the district court's decision. San Quentin has actually been operating under new disciplinary Plans for more than three years, although the officials have never been ordered to implement any new or different Plan at all.

How disciplinary proceedings are now conducted *in practice* is a matter of considerable dispute that has not yet been resolved by the district court (see R196-283, 302-359). The parties have presented new evidence

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—Inmate gets copy of allegations prior to hearing.

—If an inmate is locked up pending a hearing, the institution classification committee is immediately notified, and takes appropriate action to avoid lockup if possible.

—A timely hearing (within 72 hours) is required by an impartial committee which cannot include the officer who wrote the charges, witnesses, or other parties to the infraction.

—An objective investigation is made by an investigator selected from a list of staff volunteers approved by the warden or superintendent.

—Witnesses may be called in to present information at a hearing, and witnesses may be questioned through the assigned investigating officer.

—The inmate gets a copy of the hearing committee decision—which enumerates the facts upon which the decision was based.

—The hearing cannot be held without the inmate being present. If the case is referred to the district attorney for possible criminal prosecution, disciplinary proceedings are suspended and the constitutional rights regarding self-incrimination are safeguarded." (R227-28)

This description of the differences in plans serves to demonstrate how inadequate the former procedures were and how feasible it is to implement better procedures. It is disputed, however, how the new plans operate in actual practice (see *infra*).

dealing with important aspects of current disciplinary practice, and the matter is still under submission in the district court.

As an example of the new evidence and the dispute over current practices, plaintiff Alejandro Ferrel[20] was convicted in a disciplinary proceeding of a homicide on December 28, 1971, after the officials had submitted their first Plan to the district court. The disciplinary procedures used were the same as described in the district court's decision (R288).[21] As a result, Mr. Ferrel was punished by transfer from the general prison population to segregation and he has been confined to segregation ever since December 28, 1971 (except for a brief two-week period in 1973) (R326). Mr. Ferrel has also more recently been convicted of serious disciplinary offenses, but the procedures actually used in his cases do not differ materially from those condemned by the district court (see R326-27). A thorough California legislative study and report of procedures in 1973 concluded that "The arbitrary, unchecked, and overwhelming power of the Disciplinary and Classification Committees is smothering the right of the prisoner to due process." Assembly Select Committee on Prison Reform and Rehabilitation, *Administrative Segregation in California's Prisons*, p. 6 (Sept. 1973). The report recommended that "the practice of punishing men,

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[20]Ferrel was permitted to intervene in this action by stipulation and order dated July 3, 1972 (R285).

[21]It is stipulated that although this was a serious criminal charge, Ferrel was required to plead guilty or not guilty "and asked whether he had anything to say" (R288). When he asked for an attorney, the proceedings were postponed pending referral to the district attorney and the committee assigned Ferrel to segregation *(Id.)*

where their guilt has not been proven, be terminated at once." *Id.*[22]

With regard to disciplinary hearings involving conduct that can also be prosecuted as a crime, the San Quentin procedures have changed significantly since the district court's decision. Beginning with the implementation of the new Plan in the spring of 1972, disciplinary proceedings involving criminal conduct are *postponed* until the termination of any criminal proceedings (see R186-87, 228, 298). That is, no disciplinary hearing is held until either the district attorney determines that no prosecution will be undertaken or criminal proceedings are actually terminated in the state courts.[23] The officials have presented no evidence, based on their experience over several years of postponing disciplinary hearings, that using this procedure has interfered with any correctional interest.[24]

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[22]The report, in considering assignment to segregation specifically at San Quentin, stated that "It would be extremely difficult to conclude that the convicts were given unbiased or fair hearings." *Id.* at 32.

[23]Postponing the disciplinary hearings was an alternative expressly approved by the Court of Appeals. See 497 F.2d at 823.

[24]On the other hand, respondents have presented evidence in the district court that the prison officials have attempted to circumvent due process protections by resorting to the ruse of changing the labels of the proceedings from "disciplinary" to "classification" and thereby depriving prisoners of a hearing (R196-278, 302-332, 350-358). "Disciplinary" hearings are postponed but segregation is ordered by the "classification" committee. Prisoners accused of criminal disciplinary offenses are subjected to segregation immediately following the accusation, without any due process hearing. As of January 1, 1975, of the

The record in this case shows that during an eighteen-month period (both before and after implementation of the new San Quentin Plan), 267 prisoners were referred to the District Attorney for possible prosecution; only 11 were in fact prosecuted (R201). Of 25 prisoners held in segregation as a result of allegedly criminal misconduct, 14 made statements to the disciplinary committee that were thought to be mitigating or exculpatory; several of these were arguably incriminating *(Id.)*. Many of the offenses referred to the District Attorney for possible prosecution are extremely serious, including several homicides (R224,288,331,357,365,366,367,371,375) and assaults with a deadly weapon (R327,369,373). Less serious criminal offenses include, for example, possession of weapons and possession of marijuana (R372, 373).

SUMMARY OF ARGUMENT

It is clear, and not contested by petitioners in this Court, that the consequences of disciplinary proceedings at San Quentin are sufficiently serious to require procedural safeguards against error or arbitrariness and that the procedures used at San Quentin when this action was brought did not meet rudimentary due process. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

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220 men in segregation at San Quentin, 41.3% were there for disciplinary reasons; of these, 61.5% had no hearing. As of January 1, they had been held in segregation on the average for a minimum of 11.3 months (R352, 362-376). Thus, postponing disciplinary proceedings, *unless* it is provided that the prisoner cannot be punished during the pendency of criminal proceedings, presents serious problems. See discussion at p. 45, *infra*.

Whether the *current* disciplinary procedures at San Quentin meet due process requirements has not yet been ruled upon by the district court and was not before the Court of Appeals. The Court of Appeals did specify certain safeguards that must be contained in the San Quentin disciplinary Plan submitted to the district court. We submit that such safeguards are required by due process and must be affirmed. Such safeguards are not inconsistent with *Wolff v. McDonnell.* Disciplinary punishments are significantly more serious in California than in Nebraska, and the Court in *Wolff* expressly said that the decision there was not definitive as to due process requirements in all other cases. Petitioners' four specific arguments are without merit:

I.

Special precautions are required for disciplinary hearings when the misconduct charged can also be prosecuted as a crime. The prisoner's Fifth Amendment privilege against self-incrimination as well as his due process right to be heard in his own defense must be protected.

Under the procedures challenged in this case, the San Quentin prisoner accused of criminal misconduct would be called before a disciplinary committee and warned that anything he said "can and will" be used against him in a criminal prosecution. He would also be told that he had the right to have an attorney present during interrogation, but would not in fact be allowed to have counsel. If the prisoner exercised his right to remain silent at the hearing, the committee would nevertheless

proceed to adjudicate the disciplinary infraction, relying solely upon any written reports filed against the prisoner and without hearing any defense from him.

The courts below correctly observed that this procedure presented even more serious constitutional infirmities than interrogation of a police suspect in the stationhouse, because the police suspect suffers no adverse consequences if he decides to remain silent. In contrast, the accused prisoner at San Quentin would be subject to immediate and serious punishment. For the prisoner, "the trap is unavoidable"—warned that anything he said would be used against him in a criminal prosecution, the prisoner "definitionally prejudices himself" by either (1) remaining silent, sacrificing any defense to the disciplinary charge and thus incurring severe punishment, or (2) speaking in his own defense and risking self-incrimination in a later criminal prosecution.

Numerous decisions of the Court have established that procedures operating to compel self-incriminating statements or to penalize the exercise of the Fifth Amendment privilege are invalid. The San Quentin prisoner's dilemma is even worse because he does not have the advice of counsel in deciding whether to waive his Fifth Amendment privilege or to forfeit his right to be heard in his own defense. Therefore, the courts below were correct in determining that the prisoner accused of criminal misconduct was placed in an unconstitutional dilemma.

One solution for dealing with the dilemma, authorized by the Court of Appeals, is to postpone disciplinary proceedings until after the termination of any criminal proceedings. This is in fact the course

chosen by the San Quentin officials during the past three years. It is a sound solution to the problem except in cases in which the prison officials believe that the accused prisoner must be immediately segregated in order to maintain prison security. Postponement is a viable option in all other cases, in which segregation would not be used as a control device.

In those cases in which the officials insist upon immediate segregation, the Court of Appeals gave the officials a choice: (1) they can either protect the Fifth Amendment privilege by providing counsel for the prisoner at the disciplinary hearing, thus preventing the hearing from being impermissibly coercive; or (2) they can require that the prisoner respond to questioning, and then provide "use immunity" to protect the compelled disclosures.

This Court has recognized that the presence of counsel is needed in many cases to insure protection of the Fifth Amendment privilege. Providing counsel in criminal disciplinary proceedings would be an appropriate solution to the unconstitutional dilemma forced upon the accused prisoner. This is not foreclosed by *Wolff v. McDonnell,* because: (a) this issue was not presented in *Wolff* and, because of California's unique indeterminate sentence law, this case presents a need for counsel that did not exist in *Wolff;* indeed, the California Supreme Court has required counsel in certain of these disciplinary hearings in which the term of incarceration may be affected; (b) the need for assistance of counsel is particularly strong in the context of these proceedings, in which an otherwise uncounseled prisoner would be forced to surrender one of two basic constitutional rights; (c) permitting assistance of counsel need not turn these disciplinary

proceedings into protracted and unwieldy events; (d) there is now empirical evidence on the effect of permitting counsel in disciplinary proceedings, and the Court should not conclude that providing counsel is inappropriate in the absence of evidence that this seriously infringes some correctional interest; and (e) the nation's leading correctional experts now recommend providing counsel in cases like the present one.

The Ninth Circuit's alternative suggestion that "use immunity" be provided has been the holding of most of the courts to consider the issue, and has frequently been ordered by the Court in analogous situations. Use immunity would protect the accused prisoner against the use of statements made in his own defense, thus making it possible for him freely to defend himself. He would not be forced to surrender either the right to be heard or the privilege against self-incrimination. From the State's point of view, no correctional interest would be impaired. Disciplinary hearings could be promptly held and expeditiously conducted. If use immunity is provided, the prisoner must of course be so advised at the disciplinary hearing, and should be provided with counsel substitute.

II.

The Court of Appeals held, as this Court did in *Wolff v. McDonnell*, that prisoners have a right to call witnesses on their own behalf. Such right is not unrestricted. Respondents acknowledge that reasonable restrictions may be imposed, and have not objected to the reasons for not calling witnesses proposed by the

prison officials in their Plan pending before the district court. There is no issue requiring resolution by this Court.

III.

The Court of Appeals required that when the prison officials, in their discretion, determine to deny the right of confrontation in an individual case, they must state the reason therefor and such reason must reasonably relate to the needs of prison security recognized by this Court in *Wolff v. McDonnell*. The officials have expressed "no objections to recording the reasons for refusal" to permit confrontation, and indeed their present Plan, pending before the district court, already provides for documenting reasons for not calling witnesses. To the extent that the Ninth Circuit's decision authorizes confrontation in cases in which the misconduct can also be criminally prosecuted, and to the extent that the court held that confrontation can be denied in individual cases only when the *Wolff* concerns are present, the decision is sound and should be affirmed. Respondents urge that the right is so important to the integrity of the fact-finding process that it cannot be dispensed with *except* in cases in which the *Wolff* concerns predominate. *Wolff* is not inconsistent with this result because: (a) the Court's statements on confrontation in *Wolff* were not necessary to the decision there and, in any event, the differing consequences of disciplinary hearings in Nebraska and California distinguish *Wolff* from the present case; (b) the Court's previous decisions holding

that the right of confrontation is essential to reliable fact-finding demonstrate that the right should not be discarded at least without a showing that it cannot appropriately be used in the prison disciplinary setting; (c) a limited right to confrontation can in fact be implemented without undesirable consequences, as shown by the experience of other prison systems, and the now available evidence of such experience should at least be considered on remand; (d) an appropriately limited right to confrontation makes practical sense in the prison setting, as recommended by the nation's leading correctional authorities; and (e) regardless of the outcome of this case, California officials are required by California Supreme Court decisions to conduct in-prison hearings affording the right to confrontation in certain of these cases, and unless the officials can show on remand that denial of such right in other cases is required by correctional interests, this Court should not hold that there is never any right to confrontation.

IV.

The Court of Appeals required that decisions be based on the evidence presented at the disciplinary hearing. Many decisions of this Court require, as petitioners concede, that "the accused inmate be given an opportunity to respond to any evidence adverse to him which may be considered by the disciplinary committee before reaching its decision." The Court of Appeals based its requirement on a record showing that the San Quentin committee would consider *ex parte* information casually "passed on" by other prisoners and consult off the record with guards and other

officials. Disciplinary hearings would be a sham if the decision-makers were authorized routinely to find facts on evidence kept secret from the accused. Petitioners' present disciplinary Plan does not permit this, and, while a narrow exception for nondisclosure of informants could be considered on remand, petitioners have offered no justification for any such gross departure from settled due process principles.

ARGUMENT

Introduction

Respondents do not dispute the authority of prison officials to administer prison discipline. The necessity for, and the appropriateness of, disciplinary controls is not an issue in this case. The courts below gave full deference to the judgment of prison officials regarding both the type of prisoner conduct requiring disciplinary controls and the kinds of disciplinary punishments that may be imposed. The narrow issues here involve whether prisoners must be afforded procedural safeguards essential to fair and reliable fact-finding before being subjected to punishments substantially altering the nature or prolonging the term of their imprisonment.

The courts below required a rudimentary due process hearing only when warranted because of the severity of the consequences following upon a conviction of guilt. It is clear, and not contested by petitioners in this Court, that such consequences at San Quentin are sufficiently serious to require procedural safeguards against error or arbitrariness and that the procedures

used at San Quentin when this action was brought did not meet rudimentary due process safeguards. See *Wolff v. McDonnell*, 418 U.S. 539 (1974). Therefore, the courts below were plainly correct in condemning the old procedures.

The live issue now is whether the *current* disciplinary Plan *and practice* at San Quentin satisfy rudimentary due process requirements. As pointed out in our Statement of the Case, the new disciplinary Plan was not before the Court of Appeals. Nor has it been ruled upon by the district court, which has taken new evidence as to how the Plan actually operates in practice. This Court should not in the first instance pass upon the constitutionality of the new Plan, especially without any findings by the trial court establishing how the Plan operates in practice.[25] While petitioners have not yet been ordered to do anything they are not doing voluntarily, the Court of Appeals did specify certain elements that must be contained in the Plan on remand. We submit that the Ninth Circuit's decision represents an irreducible minimum of due process and must be affirmed.

As pointed out above, under *Wolff v. McDonnell*, the San Quentin procedures in effect when this action was brought did not afford rudimentary due process safeguards. The prison officials–petitioners in this

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[25]Cf. *Albermarle Paper Co. v. Moody*, __U.S.__ 95 S.Ct. 2362, 2380 (1975). The Plan contains so much ambiguous and discretionary language that evidence of its operation in practice is essential to see whether it has any real effect (see, e.g. R317-18). There is no basis whatever for petitioners' prayer (Brief for Petitioners, p. 43) that the Court should rule on the Plan and "remand the case with directions to dismiss."

Court—do not contend otherwise. The officials do contend that the decision of the Ninth Circuit in certain respects is inconsistent with *Wolff*, or otherwise requires "too much" rudimentary due process. While we will consider petitioners' specific arguments below, it is necessary at the outset to recognize what *Wolff* did decide and what it did not decide.

The *Wolff* opinion is one of the more unusual decisions of this Court, in that the majority expressly and repeatedly states not only that (1) the decision is limited to the record before the Court, but also that (2) the decision is "not graven in stone" and "further consideration and reflection of the Court" is contemplated. 418 U.S. at 572. These factors are important in considering the present case:

1. *Wolff is distinguishable on its facts.*

Wolff involved proceedings in Nebraska prisons. The Court carefully examined the Nebraska statutory and administrative provisions governing disciplinary proceedings, as well as the testimony in the record as to how they worked in practice. The Court referred to the warden's testimony that a "great number" of disciplinary cases were "resolved without contest" and many inmates admitted guilt to an investigator. 418 U.S. at 552, n.10. The Court naturally concluded that it would be inappropriate to require much due process in such cases. In the present case, there is no contention that due process hearings are required except in cases in which there are real factual disputes and the consequences are very serious.

More importantly, the disciplinary consequences to prisoners are more serious in California than in Nebraska—California prisoners suffer greater deprivations of liberty and property. Thus, until the district court's decision in this case, California prisoners could be subjected not only to (1) isolation (the apparent equivalent of solitary confinement in Nebraska),[26] but also (2) *indefinite* confinement to segregation, (3) referral to the parole board for reconsideration or denial of parole, (4) assessment of damages or forfeiture of the prisoner's earnings, and (5) referral to the district attorney for criminal prosecution (A161-171). These serious consequences did *not* befall Nebraska prisoners, so far as the record shows, and thus were not presented in *Wolff*.

The effect of California's unique indeterminate sentence law is of critical importance. As noted above (p. 6, *supra*), the time served by California prisoners is determined not by judges but by the Adult Authority, and a single disciplinary infraction is cause for parole denial or rescission of a parole date already given.[27]

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[26]The Court in *Wolff* held that a due process hearing is required "when solitary confinement is at issue." 418 U.S. at 571, n.19. The Court reasoned that for a "major change in the conditions of confinement" which is "normally imposed only when it is claimed and proved that there has been a major act of misconduct, . . . there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Id.*

[27]As the Court of Appeals noted, because the Adult Authority has not stated reasons for its actions, "the causal connection between a record of a disciplinary offense and an adverse response by the Authority is not always evident," but it is clear that the Authority "can and sometimes does cancel a previously set parole date or reset the inmate's sentence to a statutory maximum on the basis of even minor disciplinary actions." 497 F.2d at 813. The record here shows denials of parole because of disciplinary incidents (R328,332).

This can be far more serious than the deprivation of "good time" credits involved in *Wolff* or, in some cases, than the parole revocation involved in *Morrissey v. Brewer*, 408 U.S. 471 (1972). For example, a California prisoner who is convicted of a serious disciplinary offense will almost certainly lose parole consideration for at least a year; and if he already has a parole date, he can lose it and have his sentence refixed at the maximum (which is frequently life imprisonment). The result is a significant extension of his term of incarceration. In contrast, a prisoner who loses six months' good time credit suffers less serious consequences—a still significant but shorter extension of incarceration. Also, a parolee who has, say, six months remaining on his maximum sentence could be exposed only to six months' incarceration as a result of parole revocation, while the California prisoner denied parole would be incarcerated far longer.[28] In short, because of California's indeterminate sentence law, disciplinary hearings have a special importance not present in *Wolff*.

2. *Wolff is not definitive as to due process in other cases.*

Not only is *Wolff* distinguishable on its facts, but the Court there repeatedly stated that the last word on due

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[28]It is no doubt more typical for the parolee to have longer to serve, and surely the loss of parole liberty is a grievous loss. We use the parole revocation example simply to illustrate that a revocation hearing does not necessarily and in all cases present a risk of greater loss of liberty to the parolee than a disciplinary hearing for a California prisoner.

process has not been spoken. The Court declined, for example, to mandate a general right of cross-examination "at the present time," or "for now". 418 U.S. at 568. The Court went on to say that "at this time" prison practices in this area are "diverse" and somewhat "experimental" *Id.* at 569. Regarding the right to counsel, the Court said it was not ready to require retained or appointed counsel "at this stage of the development of these procedures." *Id.* Finally, in summing up, the Court stated that its conclusions were "not graven in stone" and that further consideration of the problems on a different record was likely. *Id.* at 572. Surely *Wolff* was not intended to stifle development in this field.[29]

In short, the present case cannot be disposed of, as petitioners contend, merely by citation to *Wolff*, without careful consideration of the factual differences reflected by the record and the opportunity this case presents for "further consideration and reflection of the Court". 418 U.S. at 572. With this in mind, we turn to consideration of petitioners' specific arguments that: (1) no special safeguards are required in cases of disciplinary offenses that can also be prosecuted as crimes; (2)

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[29]That the Court did not necessarily disagree with the conclusions of the Ninth Circuit in this case can be seen from its discussion of various lower court decisions. 418 U.S. at 572, n. 20. The Court, while considering what the Court of Appeals held here, did not in any manner criticize or disapprove the Ninth Circuit's decision. Surely, if the Court's position were fixed and it deemed the Ninth Circuit's decision to be inconsistent with *Wolff*, it would have taken the obvious opportunity to say so and not granted a plenary hearing in this case. Compare *Alyeska Pipeline Service Co. v. Wilderness Society*, __U.S.__, 95 S.Ct. 1612, 1628, n.46 (1975).

the Court of Appeals too closely circumscribed the officials' power to deny prisoners the right to call favorable witnesses; (3) the Court of Appeals too closely circumscribed the prison officials' discretion to deny the right of confrontation and cross-examination; and (4) the Court of Appeals erred in requiring that prison officials must base their decisions on the evidence presented at the disciplinary hearings.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT SPECIAL PRECAUTIONS ARE REQUIRED FOR DISCIPLINARY HEARINGS WHEN THE MISCONDUCT CHARGED CAN ALSO BE PROSECUTED AS A CRIME

Under the procedures before the courts below, when a San Quentin prisoner was charged with in-prison misconduct that also constituted a crime, he was brought before the disciplinary committee and advised of his right to remain silent and to have an attorney present during interrogation. He was also specifically advised that anything he said "can and will" be used against him in a court of law (A157,167). However, if the prisoner then requested an attorney, he was told that this was not permitted until the District Attorney interviewed him. If he exercised his right to remain silent at the hearing, the committee nevertheless proceeded to adjudicate the disciplinary infraction, relying solely on any written reports filed against him and without hearing any defense (A157).

In *Miranda v. Arizona*, 384 U.S. 436, 478 (1966), this Court declared that when an individual is in

governmental custody and "is subjected to questioning, the privilege against self-incrimination is jeopardized." It is clear that in San Quentin disciplinary proceedings the accused prisoner was in fact subject to questioning. Thus, the San Quentin Institution Plan required *Miranda* warnings regarding "interrogations,"[30] stating that

> "When an inmate becomes or is suspect in the commission of a felony, he must be specifically advised of his Civil Rights before any *questioning* may take place. This condition will apply prior to each time a felony suspect is *questioned about the crime*, either *by* individual interrogators, *Hearing Court Officers, or Disciplinary Sub-Committee members*. (ID-III-07) (emphasis added).

And a prison administrator testified that the accused could in fact be questioned at the disciplinary hearing.[31] Moreover, the court below recognized that the prisoner's "opportunity to explain" at the disciplinary hearing was in truth a subtle form of interrogation. 497 F.2d at 823. The Court of Appeals accurately described the process as one of stating the evidence against the prisoner and then demanding to know "And what do you have to say about that?" *Id.* The court concluded that a disciplinary hearing is "inherently inquisitive." *Id.*[32] As the court recognized, a discipli-

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[30]*Miranda*-type warnings have been required in California prisons since *People v. Dorado*, 62 C.2d 338, 398 P.2d 361 (1965), which foreshadowed this Court's *Miranda* decision.

[31]See generally note 17, *supra*.

[32]See also *Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629, 652 (1975). Thus, with or without *Miranda* warnings it is not surprising that an accused prisoner would be impelled to make statements that may turn out to be incriminating. The record in this case shows instances in which prisoners accused of criminal misconduct made arguably incriminating statements even after receiving the *Miranda* warnings (R201).

nary hearing is "designed to induce revelation of all the facts, including the accused inmate's version of them." *Id.* Indeed, in a serious disciplinary case prison officials would be remiss in performance of their duties unless they tried to elicit a complete factual picture to deal with any possible disturbance.

In short, there is no doubt that San Quentin disciplinary hearings involving criminal misconduct constitute "custodial interrogation" within the meaning of *Miranda*.[33] It makes no difference that the interrogation is not intended to elicit evidence for criminal prosecution and the person questioned is in custody for an entirely separate offense:

> "These differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody . . .
>
> "There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights." *Mathis v. United States*, 391 U.S. 1, 4 (1968); see also *Palmigiano v. Baxter*, 510 F.2d 534, 536-37 (1st Cir. 1974); *Blyden v. Hogan*, 320 F.Supp. 513, 519 (S.D.N.Y. 1970).[34]

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[33]"By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 444.

[34]In *Miranda v. Arizona*, the Court said "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in *all settings in which their freedom of action is curtailed in any significant way* from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added).

Further, the courts below pointed out that the San Quentin procedure presented even more serious constitutional infirmities than interrogation of a police suspect in the stationhouse as in *Miranda*. The police suspect suffers no adverse consequences if he decides to remain silent.[35] In contrast, the accused prisoner at San Quentin was subject to immediate and serious punishment unless he could defend himself. The district court found that "the trap is unavoidable"—the prisoner, warned that anything he said may be used against him in a criminal prosecution, "definitionally prejudices himself" by either (1) remaining silent, sacrificing any defense to the disciplinary charge (especially a mitigating circumstances defense) and thus incurring severe punishment, or (2) speaking in his own defense and risking self-incrimination in a later criminal prosecution (A168).[36] Since there is apparently no protection

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[35]Compare *Michigan v. Tucker*, 417 U.S. 433 (1974), where the Court upheld the use of testimony obtained through interrogation without full *Miranda* warnings in a case in which the defendant declined when he was asked if he wished to have an attorney present and the Court pointed out that he was subject to "no legal sanctions" if he remained silent. 417 U.S. at 445. In these circumstances the Court found that exclusion of the testimony was not necessary to protection of the defendant's Fifth Amendment privilege.

[36]A well-reasoned lower court decision recognized that "the dilemma is '. . . likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'" *Sands v. Wainwright*, 357 F.Supp. 1062, 1093 (M.D. Fla. 1973), *rev'd on procedural grounds*, 491 F 2d 417 (5th Cir. 1973) (quoting from *Miranda v. Arizona*, *supra*, 384 U.S. at 464 U.S. at 464-65). The same analysis was made in *Carter v. McGinnis*, 351 F.Supp. 787 (W.D. N.Y. 1972). The inability to make a "free and rational choice" answers petitioners' contention that even

against double punishment—both disciplinary punishment and criminal prosecution—under the double jeopardy clause, see e.g. *United States v. Cordova*, 414 F.2d 277 (5th Cir. 1969),[37] the accused prisoner is

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though the prisoner is "caught between a rock and a hard place" (Brief for Petitioners, p. 24), it is permissible to compel him to make a choice without counsel or other means of defense. See also discussion at p. 42-43, *infra*.

[37]There has never been a well-reasoned decision on the double jeopardy problem. When the consequences of a disciplinary infraction include an increased term of incarceration, we submit that the policies underlying the double jeopardy clause ought to be applied. Compare *Breed v. Jones*, ___U.S.___, 95 S.Ct. 1779 (1975), holding that an adjudicatory finding in juvenile proceedings, coupled with criminal prosecution, violated the double jeopardy clause. One of the reasons for the decision was the "dilemma that the possibility of [later prosecution] presents for the juvenile"; if he is "cooperative" in the juvenile proceeding, "he runs the risk of prejudicing his chances" in the criminal court. 95 S.Ct. at 1791. The procedure allowed "the prosecution to review in advance the accused's defense and . . . hear him testify about the crime charged." *Id.* at 1784. Precisely the same dilemma is presented in the instant case.

Further, because of California's indeterminate sentence law the State has an effective *option* for dealing with the prisoner convicted of criminal misconduct. It (through the Adult Authority) can cause the prisoner to serve an increased term of incarceration on the basis of the disciplinary conviction. Or it can achieve the same result through a new criminal prosecution. That is, the State can satisfy its interest in imposing effective sanctions through the disciplinary process, with far less rigorous procedural safeguards for the accused. A holding that double jeopardy barred a subsequent prosecution would not, therefore, interfere with an important State interest, but would relieve the prisoner from the risk of defending himself in more than one forum and would thus resolve the issue in this case. Cf. *Barrows*

under much greater compulsion to speak than is the suspect in the police stationhouse. If the prisoner exercises his privilege against self-incrimination, the disciplinary committee imposes a serious disciplinary punishment with the prisoner "stripped of any possible means of defense" (A170). This makes the price of silence "costly" and impermissibly penalizes the prisoner's exercise of his Fifth Amendment privilege.[38] As the Supreme Court of New Jersey recently said in a case directly in point, the prisoner's statement in a disciplinary hearing, "in substance if not in form, must be regarded as 'compelled' in the sense that its absence would project the 'grievous loss' entailed in disciplinary punishment. The imminence of punishment affecting his liberty exposes him to a 'penalty' equivalent at least to that involved in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) [and other cases cited in note 38, *supra*]." See

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v. Hogan, 379 F.Supp. 314 (M.D.Pa. 1974) (criminal acquittal bars administrative prison punishment).

The California officials' recent rule change (R381-82), requiring the disciplinary committee to accept the verdict of the court or jury as to guilt or innocence, does not solve the double jeopardy problem since it expressly permits both disciplinary and criminal punishment.

[38]See *Lefkowitz v. Turley*, 414 U.S. 707 (1973); *Uniformed Sanitationmen v. Commissioner*, 392 U.S. 280 (1968); *Spevack v. Klein*, 385 U.S. 511, 515 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Griffin v. California*, 380 U.S. 609, 614 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); Cf. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

Avant v. Clifford, 67 N.J. 496, 341 A.2d 629, 654 (1975).[39]

In *Lefkowitz, supra*, this Court held that a public contractor could not be required, on pain of losing his contracts, to waive immunity or to testify regarding his possibly criminal business dealings. The Court said that any statement in these circumstances must be deemed compelled: "A waiver secured under threat of substantial economic sanction cannot be termed voluntary." 414 U.S. at 82-83. Even though the State had a "strong, legitimate interest in maintaining the integrity of its civil service" (certainly the interest in prison discipline is no greater), the Court held that the contractor must be "protected at least against the use of his compelled answers and evidence derived therefrom." *Id.* at 78.

Applying the *Lefkowitz* reasoning to the present case, it is apparent that any uncounseled prisoner statement to a disciplinary committee must be deemed compelled, as held in *Avant v. Clifford* and the cases

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[39]See also *Palmigiano v. Baxter*, 510 F.2d 534 (1st Cir. 1974); *Jones v. Manson*, 393 F.Supp. 1016 (D. Conn. 1975); *Roberts v. Taylor*, 390 F.Supp. 705 (D.R.I. 1975); *Sands v. Wainwright*, 357 F.Supp. 1062 (M.D.Fla. 1973), *rev'd on procedural grounds*, 491 F.2d 417 (5th Cir. 1973); *Carter v. McGinnis*, 351 F.Supp. 787 (W.D.N.Y. 1973); *Fowler v. Vincent*, 366 F.Supp. 1224 (S.D.N.Y. 1973); *Cf. Melson v. Sard* 402 F.2d 653, 655 (D.C. Cir. 1968); *People v. Coleman*, 13 C.3d 867, 533 P.2d 1024 (1975). These cases hold that the prisoner must at least be afforded "use immunity."

cited in note 39, *supra*.[40] The potential penalties–including an increased term of imprisonment–are at least as serious as economic sanctions. It makes no difference that the penalties are not in form imposed simply because the prisoner invokes the privilege to remain silent, as in *Lefkowitz, Garrity v. New Jersey* and similar cases. In substance, there is no doubt that the prisoner is penalized because of his silence, even though the disciplinary committee may not expressly draw an inference of guilt from the silence. Without any presumption of innocence or rules of evidence, without counsel to offer a defense, and with a tribunal of officers clearly not disposed to give him the benefit of any doubt, the prisoner's silence assures conviction of the offense. The committee simply accepts the charging officer's report at face value, and there cannot realistically be any doubt of the outcome. The prisoner's plight is similar to that of the accused in *Griffin v. California*, 380 U.S. 609 (1965), and *Simmons v. United States*, 390 U.S. 377 (1968). In *Griffin*, the accused's silence worked to his detriment because of the comment thereon presented to the jury. The Court

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[40]The *Lefkowitz* decision also flatly contradicts the assertion of the government in this case that "the privilege against self-incrimination applies directly only to 'criminal' cases" (Brief for United States as *amicus curiae*, p. 49, n.17). *Lefkowitz* said it was settled that the Fifth Amendment entitles a citizen "not to answer official questions put to him in *any* other proceeding, *civil or criminal, formal or informal*, where the answers might incriminate him in future criminal proceedings." 414 U.S. at 77 (emphasis added). See also *Miranda v. Arizona*, 384 U.S. at 467 (privilege applies "to protect persons in *all settings in which their freedom of action is curtailed in any significant way* . . .") (emphasis added). The applicability to all such proceedings was reaffirmed in *Maness v. Meyers*, 419 U.S. 449, 464 (1975), and *Kastigar v. United States*, 406 U.S. 411, 444 (1972).

held that this made exercise of the privilege "costly," 380 U.S. at 614, but it was not by any means a certainty that the silence would both be commented upon and lead to a verdict of guilt. Similarly, in *Simmons* the accused's reluctance to testify on a suppression motion (lest his statements might be used against him at trial) did not necessarily mean that he would be convicted. The point is simply that the prisoner facing serious disciplinary punishment is substantially prejudiced when, as a condition of invoking his Fifth Amendment privilege, he is required to forfeit his right to be heard in defense.[41]

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[41]Petitioners argue that *Crampton v. Ohio*, 402 U.S. 183 (1971) establishes that this does not result in any constitutional deprivation (Brief for Petitioners, p. 25). The Court there held that a separate penalty trial was not constitutionally mandated in capital cases, despite the "tension" between the accused's right to remain silent on the issue of guilt and his right to present mitigating testimony on the issue of punishment. But the analogy is not apt. The accused in a capital case is not "stripped of any possible means of defense" even if he decides not to take the witness stand. He enjoys the presumption of innocence (which is unknown at prison disciplinary hearings) and is protected by the reasonable doubt requirement. Strict rules of evidence govern the State's case against him. He has the right to a decision by a jury selected from a cross-section of the community. He is represented by an attorney who can cross-examine and call witnesses and argue mitigating circumstances to the jury. But the silent prisoner accused of crime in a disciplinary proceeding lacks all these protections.

The California Supreme Court in a scholarly opinion recently addressed itself to precisely this question. See *People v. Coleman*, 13 C.3d 867, 533 P.2d 1024 (1975). It analyzed the kinds of cases that present "the problems of conflicting constitutional rights" when there is the possibility of a criminal prosecution. For example, civil litigation may present a possibility of

Further, unlike all the cases relied upon by petitioners, here the accused is forced to elect between forfeiting either his privilege against self-incrimination, or his right to be heard, without the assistance of counsel.[42] This, coupled with the threat of immediate

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self-incrimination in a later criminal proceeding, but the party in such litigation enjoys "a high degree of procedural protection against arbitrariness." 13 C.3d at 886. At the other end of the spectrum, however, are proceedings which "accord the defendant minimal procedural rights but which have the potential of imposing serious personal deprivations. Prison disciplinary hearings epitomize this class." *Id.* at 885. The California Court reasoned that "if already minimal procedural protections are further eroded by the need to preserve intact the defendants' full rights at a pending criminal trial, there are insufficient safeguards against the imposition of arbitrary deprivations at the [prison disciplinary hearing]." *Id.* at 886. In these circumstances, silence by an uncounseled prisoner cannot be considered a "strategic" alternative. *Id.* at 883. See also *Palmigiano v. Baxter,* 487 F.2d 1280, 1288-89, n.21 (1st Cir. 1974).

The Supreme Court of New Jersey is in accord: "In light of the fewer procedural safeguards available and the limitations placed on the inmate's tools of defense, an inmate's decision to remain silent is tantamount to a sacrifice of his defense." *Avant v. Clifford, supra,* 341 A.2d at 653.

[42]Thus, the defendants in *Chaffin v. Stynchcombe,* 412 U.S.17 (1973), *Brady v. United States,* 397 U.S. 742 (1970), and *United States v. Soloman,* 509 F.2d 863 (2d Cir. 1975), were all advised and represented by counsel when the choices (which were not in any event analogous to the present case) had to be made. In *United States v. Kordel,* 397 U.S. 1 (1970), the accused corporate officer was represented by counsel and was in no sense disabled from fully defending himself. Indeed, the Court twice pointed out that this was *not* "a case where the defendant is without counsel." 397 U.S. at 10, 12. In contrast, as the district court found in this case, the accused prisoner in a disciplinary proceeding who is without counsel and exercises his privilege of

punishment, plainly deprives him of his "free choice to admit, to deny, or to refuse to answer." *Garrity v. New Jersey, supra,* 385 U.S. at 496; he cannot make a "free and rational choice" whether to waive his privilege. *Miranda v. Arizona, supra,* 384 U.S. at 464-65; *Sands v. Wainwright, supra,* 357 F.Supp. at 1093; the choice to defend himself is not made "in the unfettered exercise of his own will." *Malloy v. Hogan, supra,* 378 U.S. at 8. In this sense, the prisoner's dilemma is worse than that of the parties in *Lefkowitz* and all the other cases, who could at least make their choices with the advice of competent counsel.

A common denominator of *Wolff v. McDonnell* and all the due process cases is the accused's right to be heard in his own defense. That is, even if it is determined that the accused prisoner is not entitled to extensive procedural rights, everyone concedes his right to appear and be heard. This right is worthless, however, when the prisoner wishes to exercise his Fifth Amendment privilege, for unless special precautions are taken, he will be defenseless to the disciplinary charge.

Accordingly, the courts below were correct in determining that the prisoner accused of criminal misconduct was placed in an unconstitutional dilemma. The issue then is how best to deal with the dilemma. The Court of Appeals said that it would be permissible

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remaining silent is "stripped of any possible means of defense." (A170). In *DeVita v. Sills,* 422 F.2d 1172 (3d Cir. 1970), a judge faced a disbarment proceeding linked to criminal charges. Not only was the judge represented by counsel and fully able to call and cross-examine witnesses, but he was also given immunity in the disbarment proceeding from use of any statements he might make. But San Quentin prisoners had neither counsel, nor witnesses, nor immunity.

for the officials to postpone disciplinary proceedings until after the termination of any criminal proceedings. 497 F.2d at 823. Such postponement is also the recommendation of the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 2.11 (1973.)[43] Postponement is in fact the course chosen by the San Quentin officials. Since they implemented their new disciplinary Plan in 1972, disciplinary proceedings have been postponed when the case is referred to the district attorney for prosecution (R186-87, 228, 298). The officials urge in this Court, however, that postponement of such proceedings is unacceptable (Brief for Petitioners, p. 17, n.5; p. 29, n.15). To the extent petitioners argue that no special precautions at all are required, they are mistaken, as we have shown above. Further, petitioners have offered no evidence—based on their three years of experience in postponing disciplinary hearings—to show that postponement has in fact interfered with any correctional interest.

There is thus no persuasive reason for not postponing proceedings in many if not most of the cases that are

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[43]Postponement may also be appropriate in analogous situations. Thus, the California Supreme Court recently said that when a probationer faces revocation of probation because of alleged commission of a new crime, "the most desirable method of handling the problems" of concurrent proceedings would be to postpone the revocation proceedings until completion of the criminal case. *People v. Coleman*, 13 C. 3d 867, 895, 533 P.2d 1024 (1975). This is also the position of the American Bar Association *Standards Relating to Probation*, 5.3. The reasoning of both the court and the ABA is that requiring the probationer to defend himself at the revocation hearing, prior to criminal trial, is inconsistent with protection of the Fifth Amendment privilege. The reasoning has equal application here.

referred for possible criminal prosecution. There will undoubtedly be cases in which the officials believe that the accused prisoner must be immediately segregated in order to maintain prison security.[44] There is no reason to believe, however, that *every* accusation of criminal misconduct will be deemed to require segregation. Thus, postponement is a viable option in all the criminal cases in which segregation is not needed as a control device. In many cases it is likely that prison officials will be satisfied either to rely only on criminal sanctions, so long as no present threat to security is posed, or to await the outcome of criminal referral (usually a district attorney's decision not to prosecute) before invoking intramural disciplinary sanctions.

In those cases in which the officials insist on segregation upon the criminal accusation, however, postponement is not a viable option, since the serious consequence of segregation cannot under *Wolff* be imposed without a hearing affording due process protections.[45] Because of the referral for criminal prosecution, such hearings require special precautions to protect the accused's privilege against self-incrimination and his right to defend himself against the disciplinary charge.

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[44]If the period of segregation is relatively short—a few days—there does not seem to be any constitutional obstacle to such segregation without a prior hearing. Both of the courts below specifically stated that this could be done in an emergency (497 F.2d at 817, n.15; A178).

[45]San Quentin's refusal to recognize this led to further proceedings in the district court. See note 24, *supra*. While postponing "disciplinary" hearings, the officials imposed long-term segregation by "classification," without any due process protections at all. This left the accused prisoner worse off than ever, for he was subjected to an extraordinarily serious disciplinary punishment without any fact-finding hearing at all.

It is not sufficient simply to rely on the *Miranda* exclusionary rule. While the failure to give *Miranda* warnings may result in exclusion of the prisoner's statements at a later criminal trial, and while even the giving of *Miranda* warnings–as California did and does–may not lead to a finding that "waiver" of the self-incrimination privilege was valid, these points are not settled and would be a fertile field for litigation. Further, the prisoner would not be protected against the risk of unintentionally incriminating himself by "volunteering" statements in his own defense, as "volunteered" statements are outside the scope of *Miranda's* protection. 384 U.S. at 478. Some prisoners would also, with or without *Miranda* warnings, recognize the possibility of self-incrimination, and would refuse to make any statements at the disciplinary hearing; but they would then be left with no other means of defending themselves.[46] The basic problem is the threat of immediate and serious punishment if the prisoner remains silent, and no exclusionary rule can deal with this problem. While *Miranda* may be "only a rule of evidence," as petitioners contend, the *Lefkowitz v. Turley* line of cases (see note 38, *supra*) establishes

[46]This is what the prisoner did in *Haines v. Kerner*, 404 U.S. 519 (1972). Rather than explain his version of the events at the disciplinary hearing, the prisoner remained silent when accused of assault and was sentenced to solitary confinement. This Court ruled that he was entitled to a hearing on his claim of unduly harsh punishment.

This is also what plaintiff Clutchette did in the present case, when he was informed that his retained lawyer could not be present at the hearing (plaintiff's Exhibit 1, introduced in evidence at A94); plaintiff Ferrel did the same (R288).

that no penalties may be imposed for exercising the Fifth Amendment privilege, and that procedures failing to protect the privilege are invalid. *Uniformed Sanitationmen v. Commissioner, supra,* illustrates the point. There, *Miranda*-type warnings were in fact given. 392 U.S. at 283, n.4. The sanitationmen were even represented by counsel. But the Court held that the economic sanctions imposed when they remained silent invalidated the procedure. Thus, regardless of whether there is "custodial interrogation" within the meaning of *Miranda*, or whether the failure to give *Miranda* warnings might trigger the exclusionary rule, the threat of immediate disciplinary punishment for an uncounseled prisoner presents an equally invalid procedure—the prisoner is required to forfeit either his Fifth Amendment privilege or his due process right to speak in his own defense at the disciplinary hearing.[47]

To avoid this forced surrender of one of two constitutional rights, for those cases in which disciplinary proceedings are not postponed, the Court of Appeals gave the prison officials a choice: (1) they can either protect the Fifth Amendment privilege by

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[47]For the same reason, the Court must reject petitioners' contention that the prisoner is subject to no deprivation unless and until his statements are actually offered in evidence at the criminal trial. The deprivation occurs *at the disciplinary hearing*, when the prisoner is forced to surrender one of two basic rights. The Court in *Lefkowitz* did not wait for any criminal proceeding—it affirmed an *injunction* against the unconstitutional procedure. See *Turley v. Lefkowitz*, 342 F.Supp. 544, 549 (W.D.N.Y. 1972). Similarly, the attorney in *Spevack v. Klein, supra,* and the sanitationmen in *Uniformed Sanitationmen, supra,* all resisted the coercive pressure to testify and there was no criminal trial, but the procedures were nonetheless held invalid.

providing counsel for the prisoner at the disciplinary hearing, thus preventing the hearing from being impermissibly coercive; or (2) they can require that the prisoner respond to questioning, but they must provide "use immunity" as a necessary consequence of the compelled disclosures. 497 F.2d at 823-24, n.23.

A. Counsel

Providing representation by counsel is a recognized measure to insure protection of the Fifth Amendment privilege. See *Michigan v. Tucker, supra,* 417 U.S. at 444; *Miranda v. Arizona, supra,* 384 U.S. at 470. With the advice of counsel, the accused prisoner can make an intelligent and knowing decision whether it is in his interest to speak in his own defense at the disciplinary hearing, or whether the risk of self-incrimination is too great. If he elects to remain silent, upon the advice of counsel, he is still not defenseless, for counsel can present his side of the case, urge the committee to find mitigating circumstances, etc. We believe that providing counsel is an appropriate solution to the unconstitutional dilemma forced upon the accused prisoner. We do not believe this solution is foreclosed by *Wolff v. McDonnell,* for the following reasons:

First, as all of the post-*Wolff* lower court decisions have noted, the issue of protecting the privilege against self-incrimination in disciplinary hearings involving criminal misconduct was not presented in *Wolff.* Thus, while the Court declined to hold that there is a general right to counsel in prison disciplinary hearings, it had no occasion to consider the unusual situation presented when the prisoner is accused both of crime and of

disciplinary misconduct. Further, as pointed out above (pp. 5-8, 30-31, *supra*), the consequences of conviction in a disciplinary hearing in California are significantly more serious than such consequences in Nebraska. The most important differentiating feature is the effect of the California indeterminate sentence law, under which prisoners found guilty of serious disciplinary infractions risk significantly longer terms of incarceration. The Adult Authority can extend the term of incarceration because of a criminal disciplinary incident, without the procedural protections of a criminal trial. Of course, the more seriously an individual can be injured by action of the government, the greater his entitlement to fair fact-finding procedures. Indeed, in the context of rescission of a parole date, the California Supreme Court has squarely held that the prisoner is entitled to all of the protections of *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *including* the right to counsel. *Gee v. Brown*, 14 C.3d 571, 536 P.2d 1017 (1975); *In re Prewitt*, 8 C.3d 470, 503 P.2d 1326 (1972). The court pointed out that "The fact that the [disciplinary hearing on parole rescission] takes place in the 'closed, tightly controlled' prison environment [citing *Wolff*] is of no [California] constitutional significance . . ." *Gee v. Brown, supra*, 14 C.3d at 575, n.2.[48] The court in *Gee*

[48]Another factor militating in favor of as careful procedures in disciplinary hearings as in parole revocations is that disciplinary decisions are not made by high-ranking authorities appointed by the governor to perform the sensitive task of making parole decisions in light of all relevant information; rather, such decisions are made by prison guards whose qualifications are unknown and who have no special distinction making them the safe repository of sweeping powers.

explicitly based its decision on the California Constitution. Accordingly, regardless of the outcome of the present case, California officials must conduct full *Morrissey-Gagnon* proceedings inside the prison walls in cases in which the prisoner faces potential parole rescission. There is no indication that providing counsel in these cases will unduly burden disciplinary committees at San Quentin. After all, the record shows that the disciplinary committee hears an average of only seven cases a week (A30). The record does not show how many of these involve concurrent criminal charges or how many could not be postponed pending the outcome of criminal proceedings. Providing counsel for the small number of cases involving criminal misconduct that could not be postponed would not, on this record, seriously burden San Quentin officials.

Second, as the Court of Appeals noted in this case, "The need for assistance to permit adequate presentation of a defense is particularly strong in the context of prison disciplinary proceedings," 497 F.2d at 821, because "penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery*, 393 U.S. 483, 487 (1969). The traditional reasons for requiring counsel[49] apply with particular

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[49]"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S.45, 68-69 (1932). Because this Court has deemed the right to counsel so important to "the very integrity of the fact-finding process," the decisions establishing that right in the criminal context have been applied retroactively. See, e.g. *McConnell v. Rhay*, 393 U.S.2,3 (1968).

force in cases in which an uncounseled prisoner is forced to surrender one of two basic constitutional rights. In this context, "counsel substitute" will not do.[50] As the Court said in *Maness v. Meyers*, 419 U.S. 449, 466 (1975), "The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege." Accordingly, there is a compelling need for legal advice in electing whether to waive the privilege or to invoke it and risk the disciplinary consequences.

Third, it should not be assumed that permitting the assistance of counsel will unduly prolong or complicate disciplinary proceedings. This Court has recognized in several contexts that counsel can enhance the fairness of proceedings without necessarily playing an inappropriate or unduly adversarial role. See, e.g. *United States v. Ash*, 413 U.S. 300, 312-13 (1973);[51] *United States*

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[50]As pointed out above (p. 42, n.42, *supra*), in all of the cases in the *Lefkowitz* line of cases, and in all of the cases relied upon by petitioners, the accused had the benefit of the advice of counsel. But an authoritative study of California's response to the order of the district court in this case concluded that the San Quentin disciplinary Plan's provisions on representation at disciplinary hearings were "grossly deficient." Vanderet, *Procedural Due Process in California Prisons*, California State Bar Journal, 668, 742 (Nov.-Dec. 1973).

[51]In *Ash* the Court declined to mandate a right to counsel at a photographic "show-up," principally because the accused was not present at the display and counsel could not therefore be of any significant assistance to him. In discussing *Wade*, the Court pointed out that a line-up, in contrast, "offered opportunities for

v. Wade, 383 U.S. 218 (1967); Cf. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970). In *Landman v. Royster*, 333 F.Supp. 621, 654 (E.D.Va. 1971), the court ordered that prisoners be permitted representation by retained counsel at disciplinary hearings, rejecting as ill-founded speculation the prison's objection "that the presence of counsel might turn the hearing into a 'hassle,'" and observing that its own experience with *pro se* trial litigants indicated that the contrary was more likely true. Accord, *Pearson v. Townsend*, 362 F.Supp. 207 (D.S.C. 1973); *Inmate 24394 v. Schoen*, 363 F.Supp. 683 (D.Minn. 1973); *Campbell v. Rodgers*, 1 Prison Law Rptr.99 (D.D.C. 1972) (consent decree). In *Roberts v. Taylor*, 390 F.Supp. 705 (D.R.I. 1975), a prison decision in point here, the court ordered that the prisoner be permitted to consult with counsel and that counsel could be present during the disciplinary hearing, but only as a "non-participating legal advisor." 390 F.Supp. at 709-710. In short, there are ways of affording prisoners the benefit of the advice of counsel without turning disciplinary proceedings into protracted and unwieldy events.

Fourth, in *Wolff* the trial court deemed itself bound by then existing Eighth Circuit precedent on the due process issue, and therefore received virtually no evidence concerning the need for, or workability of,

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the prosecuting authorities to take advantage of the accused," that counsel would be more sensitive to "suggestive influences" than the accused and that without counsel the accused might later be unable to present his version of the event "without giving up his privilege against compulsory self-incrimination." 413 U.S. at 312-13.

due process safeguards like counsel. See *McDonnell v. Wolff*, 342 F.Supp. 616, 627-28 (D.Neb. 1972). Accordingly, there was no opportunity in *Wolff* to consider empirical evidence on the effect of permitting counsel in disciplinary hearings. Such evidence is now available. A survey conducted by the American Bar Association Commission on Correctional Facilities shows that 14 states permit some form of representation by counsel in disciplinary hearings. *Survey of Prison Disciplinary Practices and Procedures*, 22 (1974). Two states, Kansas and Delaware, provide for the appointment of counsel when the disciplinary charge can also be prosecuted as a crime. *Id.* We do not believe that the Court should conclude that providing counsel in disciplinary proceedings involving crimes is, as a matter of law, inappropriate to the nature of the proceedings without any evidentiary basis for this conclusion. The Court of Appeals in this case stated that on remand the district court should consider, *inter alia*, "the availability of members of the Bar through publicly funded and voluntary programs in the vicinity of San Quentin." 497 F.2d at 822. If lawyers are in fact available to serve in the few disciplinary hearings involving criminal charges, and if the evidence of the experience of prison systems permitting counsel shows that no correctional interest would be seriously infringed, surely prisoners should not be denied the protections that counsel can provide.

Fifth, although many prison officials and guards oppose providing counsel in any disciplinary hearings, as they have always opposed the introduction of any outsiders into the prison environment, the nation's experts in the correctional field have now determined

that providing counsel in serious disciplinary proceedings is quite appropriate. Thus, the National Advisory Commission on Criminal Justice Standards and Goals, composed of leading experts in the field, authorizes the use of retained or volunteer counsel, stating that the prisoner may "select someone, including legal counsel, to assist him at the hearing." *Corrections,* Standard 2.12 (1973). Similarly, the *Model Rules and Regulations on Prisoners' Rights and Responsibilities,* Rule V-8(a) (West Pub'g Co. 1973), provide that in cases of "major offenses, the accused may be represented by an attorney." Finally, as early as 1967, the President's Commission on Law Enforcement and Administration of Justice recommended that in prison disciplinary proceedings that may lead to a substantial loss of good time and a resultant increase in the actual length of imprisonment, the prisoner should be provided "the right to representation by counsel." Task Force Report: *Corrections,* 86 (1967). At the very least, the district court on remand should be directed to take testimony from experts in the field to establish an evidentiary record as to the appropriateness of providing counsel in serious disciplinary hearings.

B. Use Immunity

The Ninth Circuit's alternative suggestion that "use immunity" be provided has been the holding of most of the courts to consider the issue. See *Palmigiano v. Baxter,* 510 F.2d 534 (1st Cir. 1974); *Shimabuku v. Britton,* 503 F.2d 38, 44-45 (10th Cir. 1974); *Jones v. Manson,* 393 F.Supp. 1016, 1024 (D. Conn. 1975); *Roberts v. Taylor,* 390 F.Supp. 705 (D.R.I. 1975);

Sands v. Wainwright, 357 F.Supp. 1062, 1093 (M.D.Fla. 1973), *rev'd on procedural grounds*, 491 F.2d 417 (5th Cir. 1973); *Carter v. McGinnis*, 351 F.Supp. 787 (W.D.N.Y. 1973); *Fowler v. Vincent*, 366 F.Supp. 1224, 1227-28 (S.D.N.Y. 1973); *Avant v. Clifford*, 67 N.J. 496,341 A.2d 629, 653-56 (1975); cf. *Melson v. Sard*, 402 F.2d 653,655 (D.C. Cir. 1968) (parole revocation hearing); *People v. Coleman*, 13 C.3d 867, 533 P.2d 1024 (1975) (probation revocation hearing). As the Supreme Court of New Jersey recently said in *Avant v. Clifford, supra*, "To be free to speak in defense or extenuation, a way must be found to immunize whatever the prisoner says or whatever evidence may be derived from what he says from use against him in a subsequent criminal proceeding for the establishment of guilt of the offense involved." 341 A.2d at 653. This Court has required use immunity in analogous situations. See, e.g. *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1974); *Kastigar v. United States*, 406 U.S. 441 (1972); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); cf. *Simmons v. United States*, 390 U.S. 377, 390 (1968) (testimony on motion to suppress inadmissible at trial); accord, *Brown v. United States*, 411 U.S. 223, 228 (1973). As Mr. Justice White explained in *Maness v. Meyers*, 419 U.S. 449, 474 (1975), a "constitutionally imposed use immunity" is called for in these kinds of coercive situations.[52]

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[52]The provision of use immunity in these situations reflects that "This Court has been zealous to safeguard the values which underlie the [Fifth Amendment] privilege." *Kastigar v. United States, supra*, 406 U.S. at 445, citing *Miranda v. Arizona*.

Use immunity would protect the accused prisoner against the use of statements made in his own defense (or the fruits thereof) at a later criminal prosecution, thus making it possible for him freely to defend himself. He would no longer be forced to surrender either the right to be heard or his privilege against self-incrimination. Moreover, from the State's point of view, no correctional interest would be impaired by providing use immunity. Disciplinary hearings could be promptly held and expeditiously conducted, and the disciplinary committee could openly interrogate the prisoner to elicit *all* the relevant facts and circumstances.

Petitioners' objection to use immunity (Brief for Petitioners, p. 17, n. 5) is completely without merit. Petitioners state simply that the prison administrators have "no authority" to grant any immunity. But they do not need any statute or express authority, for "the Fifth Amendment takes care of that without a statute." *Adams v. Maryland*, 347 U.S. 179, 181 (1954). That is, the Constitution itself requires the immunity when testimony is compelled. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); *Uniformed Sanitationmen v. Commissioner*, 426 F.2d 619, 627 (2d. Cir. 1970); *Avant v. Clifford, supra*, 341 A.2d at 655; cf. *Simmons v. United States, supra*, 390 U.S. at 390 (testimony on motion to suppress may not be used at trial); *Maness v. Meyers, supra*, 419 U.S. at 474 ("constitutionally imposed use immunity;" concurring opinion of Mr. Justice White). Indeed, the California Supreme Court has already decided that in California no express authority would be needed in these circumstances. *Byers v. Justice Court*, 71 C.2d 1039,

1050-57, 458 P.2d 465 (1969), *reversed on other grounds sub nom California v. Byers*, 402 U.S. 424 (1971).[53]

If use immunity is provided, the prisoner must of course be so advised at the disciplinary hearing. See e.g. *Uniformed Sanitationmen v. Commissioner, supra*, 426 F.2d at 627; *Jones v. Manson, supra*, 393 F.Supp. at 1024; *Fowler v. Vincent, supra*, 366 F.Supp. at 1228; *Avant v. Clifford, supra*, 341 A.2d at 655-56. We also believe that the accused prisoner is entitled to counsel substitute at the hearing. This is necessary so that the prisoner is not totally uncounseled as to the meaning of use immunity and his right at the disciplinary hearing to defend himself without fear of self-incrimination. Cf. *Maness v. Meyers, supra*, 419 U.S. at 466; compare *United States v. Ash, supra*, 413 U.S. at 312-13. Counsel substitute is also of course needed for all the reasons expressed by the Court in *Wolff v. McDonnell*. Disciplinary charges that can also be prosecuted as crimes usually result in isolation of the accused before the disciplinary hearing (preventing the prisoner from preparing a defense), and of course the issues are likely to be more complex than lesser disciplinary offenses. Thus, "the complexity of the issue makes it unlikely that the inmate will be able to collect and present the

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[53]Petitioners also say that use immunity would not work because there is "no transcription" made of disciplinary hearings. But none is needed. Use immunity would simply bar affirmative use of anything the accused said at the hearing. As to derivative use (i.e. the "fruits" of the accused's statements), a transcript of what the accused said is irrelevant, as is true in all cases of derivative use immunity, for the prosecution simply has to use independently acquired evidence. See *Kastigar v. United States, supra*, 406 U.S. at 460-62.

evidence necessary for an adequate comprehension of the case," and he is entitled at least to lay representation at the hearing. *Wolff v. McDonnell, supra,* 418 U.S. at 570.[54]

In summary, the Court of Appeals was correct in holding that a prisoner accused of criminal misconduct may not be subjected to disciplinary punishment without a hearing affording effective protection of his Fifth Amendment privilege against self-incrimination. In most cases we believe that postponement of the proceedings will be sufficient protection. In cases that cannot be postponed, the State may choose between providing counsel or use immunity and counsel substitute.

II.

THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT ACCUSED PRISONERS HAVE THE RIGHT TO CALL WITNESSES ON THEIR OWN BEHALF, SUBJECT TO REASONABLE RESTRICTIONS

In holding that accused prisoners have a right to present witnesses, the Court of Appeals reasoned that "The fundamental guaranty of due process is the opportunity to be heard. Prior to the imposition of

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[54]The use immunity provided must be broad enough to cover the prisoner's statements to counsel substitute, for there is no attorney-client privilege that would otherwise cover such communications, see *Carter v. McGinnis, supra,* 351 F.Supp. at 793-94, and it would be egregiously unfair to use such confidential communications at a later criminal trial.

disciplinary sanctions, an accused inmate must have an opportunity to show, if he can, that he did not violate the rule as charged or to explain that, although guilty of the charged infraction, there are mitigating circumstances." 497 F.2d at 818. The court said that the ability to produce evidence other than the prisoner's own testimony "is necessary to assure that he will be heard 'in a meaningful manner' ", citing *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). The court concluded that without such a right, "relevant exculpatory evidence, not within the personal knowledge of the accused but nonetheless essential to a fair and accurate fact finding determination, may not be heard at all . . ." *Id.*[55]

However, the Court of Appeals did not mandate an unrestricted right to call witnesses, but acknowledged the disciplinary committee's power to limit the number of witnesses. While the only reasons specifically mentioned by the Court of Appeals for limiting witnesses were "to prevent repetitiousness" and to avoid "irrelevant or merely cumulative evidence," the case was remanded to the district court for further proceedings. 497 F.2d at 824. The further proceedings, of course, involve consideration of the new disciplinary Plan submitted by the prison officials. The Plan now

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[55]The need to present witnesses is especially strong in cases in which the prisoner wishes to exercise his privilege to remain silent, for otherwise the committee would hear only the "prosecution" side of the case. Also, "particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision." *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970); *Landman v. Royster,* 333 F.Supp. 621, 653 (E.D. Va. 1971).

before the district court—the Plan currently being used at San Quentin—contains several other restrictions on the right to call witnesses (R297), and it has been assumed throughout by all parties that restrictions of the kind mentioned by this Court in *Wolff v. McDonnell* were not objectionable.

In *Wolff*, this Court held that a prisoner has a right to call witnesses "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 566. The Court reasoned that "ordinarily, the right to present evidence is basic to a fair hearing", but said that the right is nevertheless not "unrestricted" and "some amount of flexibility and accommodation is required . . . at least on the record made in this case." *Id.*

We believe that petitioners' complaint to this Court about calling witnesses is much ado about nothing. No one has ever contended that there is an absolute right to call witnesses. Certainly any reason for declining to call witnesses that is reasonably related to the concerns expressed by this Court—"unduly hazardous to institutional safety or correctional goals"—must be approved by the district court on remand. The Plan now before the district court provides that, for prisoners who have release dates but face disciplinary charges, "reasons for not calling a witness may include, but are not limited to: danger to the safety of an informant by reason of disclosure of his or her identity, lack of relevant information or the unavailability of the witness" (R297). Prisoners without a release date may call witnesses unless "the witness is not present in the institution, declines to appear voluntarily, is expected to provide the same information as other witnesses, has

no personal knowledge of the circumstances of the offense, or if granting the request would endanger the security of the institution or be likely to result in retribution which would harm an individual." While we have filed other objections to the Plan in the district court, we have filed no objection to these provisions.[56] This matter is clearly a proper one for consideration by the district court on remand, and need not concern this Court.

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[56]Our only objection to the Plan's provisions on witnesses does not relate to the reasons for not calling witnesses but rather to the Plan's vague and discretionary language concerning the right to call *any* witnesses. Thus, the Plan states only that witnesses with pertinent information "may" be called to the hearing; that questions "may" be asked; that inmates with release dates may "invite'. witnesses who will "normally" be called, but inmates without release dates "may" only "request" the calling of favorable witnesses. Our objection is that these provisions do not unambigously provide for a right to call witnesses (subject, of course, to proper exceptions in accordance with *Wolff*) and that "hearings" could be conducted without any witnesses at all for or against the prisoner. This is what in fact happened in a recent disciplinary hearing involving plaintiff Ferrel (see R327,330). Ferrel was denied the right to call, as favorable witnesses, the alleged victim and an officer who, according to the investigating officer, would have exonerated Ferrel. There was no indication that calling either witness would have been "unduly hazardous to institutional safety or correctional goals," *Wolff v. McDonnell, supra,* and no reason was given for refusing to call the witnesses.

III.

THE COURT OF APPEALS PROPERLY REQUIRED THAT WHEN PRISON OFFICIALS DETERMINE TO DENY THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION IN AN INDIVIDUAL CASE, THEY MUST STATE THE REASON OR REASONS THEREFOR AND THAT SUCH REASONS MUST REASONABLY RELATE TO THE NEEDS OF PRISON SECURITY.

The Court of Appeals initially held that accused prisoners have a due process right to confront and cross-examine their accusers. 479 F.2d at 818-820. In *Wolff v. McDonnell*, this Court held that confrontation was not at "the present time" constitutionally compelled and was committed to "the sound discretion of the officials of state prisons." 418 U.S. at 567. On rehearing in light of *Wolff*, the Court of Appeals prescribed a "method by which the soundness of the discretion thus accorded could be subjected to scrutiny," requiring that the officials make a record of the reason for the denial of this right and so inform the prisoner. 510 F.2d at 614-16. The court added that the reasons must relate "to the prevention of those ills about which the Supreme Court [in *Wolff*] was concerned—reprisals, unmanageability, disruption, safety of prison personnel . . ." *Id.* at 616.

Petitioners in this Court state that they have "no objections to recording the reasons for refusal" (Brief for Petitioners, p. 34).[57] Petitioners complain, however,

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[57]Most of the due process cases since *Wolff* have prescribed the same requirement of reasons to support denial of confrontation. See *Aikens v. Lash*, 514 F.2d 55,60 (7th Cir. 1975), *petition for cert. pending*, No. 75-35; *Graham v. State*

that the Court of Appeals unduly circumscribed their discretion by authorizing only certain reasons for denying confrontation and cross-examination.

We believe that any legitimate reason for denying these rights falls well within the broad and general reasons given by the Ninth Circuit. Moreover, it is apparent from the context of the Ninth Circuit's statement that the authorized reasons were only illustrative. The court said simply that the reasons used by the prison officials must be "related to the prevention of those ills about which the Supreme Court was concerned." Petitioners' Plan presented to the district court includes several reasons for denying cross-examination (R297). We have not objected to any of such reasons (see R319-321).[58] There is no reason to believe that petitioners' proposed reasons will not be approved. This is clearly a matter of detail that should and will be dealt with by the district court on remand.

Department of Correction, 392 F.Supp. 1262 (W.D.N.C. 1975); *Daigle v. Hall*, 387 F.Supp. 652 (D.Mass. 1975); *Walker v. Hughes*, 386 F.Supp. 32,42 (E.D.Mich. 1974) *Avant v. Clifford*, 67 N.J. 496,341 A.2d 629,649 (1975). A similar method of preventing arbitrariness was required by this Court in cases of denial of counsel in probation revocation hearings. *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

The Plan under which petitioners have been operating and which petitioners have submitted to the district court already provides for documenting reasons for not calling witnesses (R297). In these circumstances, and because petitioners have no objection to the reasons requirement, this aspect of the Ninth Circuit's decision must be affirmed.

[58]Our objection to the Plan on this point dealt with the failure of the Plan clearly to authorize cross-examination in *any* case, regardless of whether the *Wolff* concerns were present (See R319-320).

No one has suggested that either the Ninth Circuit or this Court in *Wolff* was laying down a precise and comprehensive code of disciplinary procedure. The district court can approve the details and authorize specific reasons for denial of cross-examination that come within the general concerns mentioned in *Wolff*.

Petitioners also complain that on rehearing the Court of Appeals preserved the right of confrontation for cases in which the prisoner is charged with misconduct that can also be criminally prosecuted. And the United States as *amicus* (Brief at p. 36) points out that the Ninth Circuit appears to have required a presumptive right of confrontation, subject only to limitation in individual cases based on the concerns expressed in *Wolff*. We agree with this interpretation of the Ninth Circuit's decision.[59] We believe that the right of

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[59]This is also, of course, the position of all the post-*Wolff* decisions cited in note 57, *supra*. These cases interpreted *Wolff* to recognize that "at least in some circumstances, prison officials may be found to have abused their discretion if they deny a request for the right of cross-examination for entirely arbitrary reasons." See *Aikens v. Lash, supra*, 514 F.2d at 60.

We disagree with the contention advanced by *amicus* (Brief at p. 37-38) that the giving of reasons for denying confrontation "cannot be accomplished" in individual cases. In most cases there will be no reason to deny confrontation; the complaining officer will simply appear and give his side of the story and there will be no reason to believe that this will result in "reprisals, unmanageability, disruption, [or risk to the] safety of prison personnel." In some cases there will doubtless be specific reasons for denying confrontation. For example: a confidential inmate informant has supplied evidence and confrontation would disclose his identity and risk reprisal by the accused or others; the accused has given indications that he intends to disrupt the hearing, harass the witness or take revenge against any accuser;

confrontation is so important to the reliability of the fact-finding process that it cannot be dispensed with *except* in cases in which the *Wolff* concerns predominate. This is not inconsistent with *Wolff*, for the following reasons:

First, *Wolff* said that prisoners would not generally "at the present time" have the right of confrontation. 418 U.S. at 568. However, this statement was unnecessary to the decision because in Nebraska prisoners were in fact allowed to question the charging party. *Id.* at 553,567, n. 17. Since the Court emphasized that prison practices in this area were "diverse" and in the "experimental" stage, and since the record in *Wolff* showed that limited cross-examination was in fact permitted in Nebraska, the Court's dictum cannot be considered a definitive ruling applicable in all circumstances.

Further, *Wolff* is distinguishable because, as pointed out above (pp. 5-8, 30-31), the consequences of disciplinary proceedings in California are more serious than in Nebraska. California prisoners face not merely solitary confiment or loss of good time credit, but also indefinite confinement to segregation, forfeiture of wages and assessment of fines, referral to the parole

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the accused demands that cumulative and repetitive witnesses, or those with no relevant information, be produced; or the complaining witness is leader of a rival prison gang and confrontation would exacerbate existing tensions. These are reasons reasonably related to the *Wolff* concerns that *can* be articulated in individual cases. There is simply no reason to believe that particularized reasons, where they exist, cannot be stated. Indeed, precisely this procedure is contemplated by the Plan developed by petitioners, put into operation and submitted to the district court (R297).

board for reconsideration or denial of parole and referral for criminal prosecution as a result of disciplinary hearings. Indeed, under California's unique indeterminate sentence law, a prisoner's term of incarceration may be drastically revised and prolonged on the basis of a single disciplinary conviction. See *In re McLain*, 55 C.2d 78, 357 P.2d 1080 (1960).[60] The effect on a prisoner's term of incarceration can in some circumstances be more serious than parole revocation. Under *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), of course, the accused is permitted to confront his accuser at a parole revocation hearing ("unless the hearing officer specifically finds good cause for not allowing confrontation"). Because *Morrissey*, *Wolff* and the other cases teach that the seriousness of the consequences significantly affects the extent to which due process protections must be afforded, greater protections are required for California proceedings than were required in *Wolff*.

Second, the right in question is too important to the integrity of the fact-finding process to be discarded without a showing that it cannot appropriately be used in the prison disciplinary setting. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). As Mr. Chief Justice Burger said in *Davis v. Alaska*, 415 U.S. 308, 316 (1974), "Cross-examination is the principal means by which the believability of a witness and the truth of his

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[60]Compare *Specht v. Patterson*, 386 U.S. 605 (1967) (extension of incarceration by finding of fact under sex offender statute requires full hearing).

testimony are tested." The right has been characterized by this Court as so essential to the "integrity of the fact-finding process" as to require retroactive application in the criminal context. *Berger v. California*, 393 U.S. 314, 315 (1969); cf. *Pointer v. Texas*, 380 U.S. 400 (1965). The right of cross-examination as the principal means of reliably finding the facts has "remained relatively immutable in our jurisprudence." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Of course, the right is not limited to criminal cases but applies whenever governmental action seriously injures an individual and the propriety of the action depends on fact-findings. *Goldberg v. Kelly*, *supra*; *Greene v. McElroy*, *supra*, 360 U.S. at 496. And the right has, of course, been required for other hearings in the correctional system. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation).

Third, a limited right to confrontation can in fact be implemented without undesirable consequences in the prison disciplinary setting. As the Court noted in *Wolff*, prisons in 28 states use some form of cross-examination in disciplinary proceedings. 418 U.S. at 567, n.18. Indeed, it is not without interest that the Rhode Island officials in the companion case at bar, *Baxter v. Palmigiano*, No. 74-1187, have routinely been conducting hearings affording these rights (e.g. Brief for Petitioner, p.4).[61] The American Bar Association

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[61] Evidence that other states permit prisoners to exercise a right is of "substantial probative value" in demonstrating that restriction of the right is not in fact required by correctional interests. Cf. *Brown v. Peyton*, 437 F.2d 1228, 1232 (4th Cir. 1971). The court in *Brown* also emphasized that courts cannot uncritically accept statements by officials (or their lawyers)

Survey of Prison Disciplinary Practices and Procedures (1974), referred to by the Court in *Wolff*, found that 14 of the 15 states expressing an opinion on implementing confrontation and cross-examination indicated that permitting these rights "had no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been 'upgraded' and that some of the inmate feelings of powerlessness and frustration had been relieved." *Survey*, at p.21. The ABA *Survey* pointed out that it was difficult for many of the other states permitting confrontation to evaluate the consequences of implementation because the procedures had only recently been adopted. Now there has been time for these prison systems to acquire considerable experience in implementing confrontation, so there presently exists empirical evidence as to how the right works in practice. We submit that this Court should not rule out confrontation in all circumstances without an evidentiary showing by the officials—who can and do frequently consult their colleagues in other states and

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regarding security dangers, without a factual basis for such statements:

> "While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them." 437 F.2d at 1232.

use them as expert witnesses–that implementation of the right seriously interferes with correctional interests. The Court should not rely on the *arguments* of officials (or their lawyers) who have never tried to implement confrontation without there being *evidence* from officials who have.[62] We believe a full evidentiary record should be developed before the district court on remand.

Fourth, an appropriately limited right to confrontation makes practical sense in the prison setting. Face-to-face with the individual who must suffer the consequences if he has exaggerated, lied or omitted modifying details, a prison guard (like any other person) will be more careful about the facts than when he is dictating an impersonal written report.[63] Prison

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[62]Petitioners repeatedly ask the Court to permit them to engage in "experimentation" in this area. But a confrontation requirement does not preclude experiments in altering disciplinary practices. "Experimentation" here is a euphemism for the hide-bound tradition of not allowing prisoners to ask questions concerning their imprisonment. It must be recognized that most of the significant changes from archaic prison practices have come about in recent years either because of direct court orders or the officials' desire to avoid a court order. See generally Note, *Judicial Intervention in Corrections: The California Experience–An Empirical Study*, 20 U.C.L.A. L.Rev. 452 (1973). "Although many [California] officials contended that modern developments in penological thinking are primarily responsible for changes in prison discipline practices, even these officials admitted that judicial interest has sped the development and adoption of such practices." *Id.* at 542.

[63]The instruction contained in the San Quentin Institution Plan directing guards to be "concise" in preparing Form 115 disciplinary charges, while commendable in some respects, can

guards are no less fallible than other men, and it is possible that their perceptions may be faulty or their judgment influenced by personal friction with the accused prisoner. Their written reports are not entitled to an "irrebutable presumption of accuracy" and it is important that they be subjected to "examination, criticism and refutation." Cf. *Kent v. United States,* 383 U.S. 541, 561 (1966).[64] Moreover, with reliance solely on written reports, a disciplinary committee does not have any opportunity to judge the credibility of the complaining witness, whether a guard or a prisoner. But "one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." See *Berger v. California, supra,* 393 U.S. at 315; *Barber v. Page,* 390 U.S. 719, 725 (1968). We therefore submit that, at the very least, the charging party must be required generally to *appear* at the

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encourage a tendency to oversimplify and omit details whose unperceived significance might prove crucial when seen from a more detached point of view.

For example, when plaintiff Ferrel was accused of an assault, he was denied the opportunity to confront two officers (R327), one of whom admitted after filing his report that "it was possible that his report was incorrect," including the "wrong name;" the other admitted that "at no time did he see anyone with a weapon" (R330).

[64]Special precautions are required in cases in which the disciplinary offense may also be prosecuted as a crime. In these cases, if the accused prisoner exercises his right to remain silent, he is disabled from presenting any defense to the disciplinary charge unless he can do so through witnesses. In such a case, the right to appear and be heard is worthless; the right to question witnesses is indispensable.

disciplinary hearing, whether or not actual questioning is permitted. See *Walker v. Hughes*, 386 F.Supp. 32, 42 (E.D.Mich. 1974). And we can conceive of no legitimate objection to questioning *by the disciplinary committee* to clarify and elicit details of an alleged offense. Cf. Friendly, "*Some Kind of Hearing*," 123 U.Pa.L.Rev. 1267, 1286, n.101 (1975).

It is not necessary to accord to prisoners the same right of cross-examination that is given criminal defendants. Simply having the complaining officer appear would produce more reliable information about what actually occurred. For example, a prisoner charged with disobeying an order might be able to show that it had been unclear or misunderstood. Away from the pressure of the situation in which the alleged violation occurred, a fair-minded guard may be expected to acknowledge the possibility of his own occasional error. Under the practice at San Quentin, he was never given this opportunity. While it is true that the disciplinary committee will probably resolve most guard-prisoner credibility issues in favor of the guard, the San Quentin practice avoided credibility issues altogether by conclusively presuming the truth of the cold words in the disciplinary reports.

The nation's leading correctional authorities now recommend that confrontation and cross-examination be permitted in serious disciplinary cases. Thus, the prestigious National Advisory Commission on Criminal Justice Standards and Goals, in its *Corrections* Standard 2.12 (1973), provides that in major disciplinary actions "the offender should be allowed to confront and cross-examine the witnesses against him." Accord, *Model Rules and Regulations on Prisoners' Rights and*

Responsibilities, Rule V-7(a) (West Pub'g Co. 1973).[65] As early as 1967, the President's Commission on Law Enforcement and Administration of Justice also unequivocally recommended that prisoners be afforded these rights in serious cases. Task Force Report, *Corrections,* 86 (Gov't Printing Office, 1967).

Petitioners' contention that permitting confrontation will alter the proper balance between guard and prisoner is not new. The American Bar Association *Survey, supra,* noted that "many correctional officers vociferously resist the notion of inmate questioning guard. They believe this undermines the relationship on which good institutional order must rest. However, *the experience of jurisdictions granting the cross-examination right does not support this belief.*" *Survey* at 21 (emphasis added). Moreover, to the extent that guard-prisoner relationships may be altered at all, this is probably desirable. The notion that a guard's power must be absolute and unquestioned is the hallmark of an outmoded and highly ineffectual prison system.[66] After all, the "track record" of the American prison

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[65]In the Foreward to the *Rules,* the Commissioner of Corrections of Massachusetts emphasizes that the *Rules* are not an idealist's notion of prisoners' rights but are "a long overdue instrument for the development of sound correctional policy." They provide "a viable blueprint from which a sound correctional management system can be constructed," and are "an invaluable tool" for officials striving to build "systems that operate fairly, thoroughly, and effectively."

[66]As Judge Sobeloff remarked, "Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men." *Landman v. Peyton,* 370 F.2d 135,140 (4th Cir. 1966).

system has hardly been an enviable one.[67] If, instead of a record notable only for failure of the system to aid in controlling crime, the prisons had established a record of great effectiveness in curbing recidivism through innovative correctional techniques, officials would have a stronger claim that their internal decision-making process should not be subject to recognized due process rules. But based on a record of general floundering, we do not believe prison administrators can justify an exemption from due process requirements to which all other government bureaucrats are subject.

Fifth, and finally, the San Quentin Plan presently before the district court in fact appears to permit cross-examination by counsel substitute representing a prisoner at disciplinary hearings (R297, Rule DP-4507). The Plan also appears to permit questioning by an inmate with a release date (*Id.*). The California authorities are required to permit cross-examination by prisoners with release dates by the California Supreme Court's decision in *In re Prewitt*, 8 C.3d 470, 503 P.2d

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[67]As Mr. Chief Justice Burger has said, "A visit to most prisons will make one a zealot for prison reform." Burger, *No Man is An Island*, 56 A.B.A.J. 325,328 (1970). After years of experience in the system, the Director of the Federal Bureau of Prisons concedes that "The most perplexing question that faces us today is how do we change offenders? The simple answer is we don't know.... Three major Federal Commissions . . . all agreed that corrections has been the weakest link in the criminal justice system." Carlson, *The Federal Prison System: Forty-Five Years of Change*, Federal Probation, 37, 39-40 (June, 1975). An indication of the failure of traditionally run prisons to correct is the fact, disclosed by the Brief of the United States as *amicus* (p.25, n. 7), that more than 52% of current federal prisoners have at least one prior commitment to a state or federal prison.

1326 (1972); see also *Gee v. Brown*, 14 C.3d 571, 536 P.2d 1017 (1975). In *Prewitt*, the court held that a prisoner who is faced with possible rescission of a parole date is entitled to all the safeguards specified by *Morrissey v. Brewer*, 408 U.S. 471 (1972), *including* the right to cross-examine witnesses.[68] Thus, California authorities must conduct in-prison hearings affording these rights in all disciplinary cases in which the prisoner has received a date but has not yet been released. Accordingly, regardless of the outcome of the present case, petitioners must continue to allow cross-examination in the circumstances required by the California Supreme Court. We submit that unless petitioners can make a showing that denial of confrontation in *other* serious disciplinary hearings is required by strong correctional interests, the Court should not hold that there is no right to confrontation in any circumstances. We believe that the matter should be explored on remand, where the district court can take evidence on the experience of other prison systems and the manner in which an appropriately limited right to confrontation can be implemented without interfering with correctional interests.

In conclusion, the Ninth Circuit's requirement that the officials permit confrontation except in individual

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[68]*Gee v. Brown, supra*, requires all the *Morrissey* rights and adds the right to counsel as specified by *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). As noted previously (p. 49, *supra*), *Gee* holds that under the California Constitution it makes no difference that these rights must be observed in hearings in the "closed, tightly controlled" prison environment of *Wolff*. 14 C.3d at 575, n.2.

cases when they have reasons related to the *Wolff* concerns is sound and should be affirmed. Details of the precise limitations on confrontation should be resolved in the first instance by the district court on remand.

IV.

THE COURT OF APPEALS PROPERLY REQUIRED THE PRISON OFFICIALS TO BASE THEIR DECISIONS IN DISCIPLINARY HEARINGS ON THE EVIDENCE PRESENTED AT THE HEARINGS

The Court of Appeals held that "the disciplinary committee must be required to make its fact finding determinations solely upon the evidence presented at the hearing." 497 F.2d at 820. Further, in accordance with *Wolff v. McDonnell*, the Court of Appeals said that "To insure compliance with this requirement, the committee must state briefly the reasons for its decision and indicate the evidence on which it relied." *Id.* These complementary requirements track precisely this Court's decision on rudimentary due process in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

Petitioners concede that procedural due process requires that the "accused inmate be given an opportunity to respond to any evidence adverse to him which may be considered by the disciplinary committee before reaching its decision" (Brief for Petitioners, pp. 37-38). The concession is well founded because, as this Court said in *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959), in a fact finding hearing "the evidence used to prove the Government's case must be disclosed to the

individual so that he has an opportunity to show that it is untrue." See also *Goldberg v. Kelly, supra,* 397 U.S. at 271; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 300-305 (1937); *United States v. Abilene & S. Ry.*, 265 U.S. 274, 289 (1924).

The Court of Appeals specified this obvious protection because the record shows that the San Quentin disciplinary committee would consider evidence outside the record. A prison administrator testified that he might take into account *ex parte* information casually "passed on" by other prisoners (A39,158); guards and officials could also be consulted off the record (A108, 51-52). In these circumstances, it was clearly appropriate to require that the evidence against the accused be presented at the hearing. Petitioners' assertion that written notice and a statement of the evidence relied upon afford sufficient opportunity to reply to any evidence against the accused (Brief for Petitioners, p. 37), is simply untrue. Unless the evidence is disclosed to the accused, there is no way he can attempt to respond to it before the committee makes its decision. Petitioners' further assertion that "the committee should be free to receive and consider information not made available to the accused inmate" is without support as a general proposition. As Mr. Justice Cardozo put it, relying on undisclosed evidence "will never do if hearings . . . are to be more than empty forms." *Ohio Bell Telephone Co. v. Public Utilities Commission, supra,* 301 U.S. at 303.[69]

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[69] The court said in *Landman v. Royster,* 333 F.Supp. 621 (E.D.Va. 1971), in language directly applicable here, that disciplinary decisions must be based on evidence "which the prisoner has the opportunity to refute . . . To permit punishment to be imposed for reasons not presented and aired would invite arbitrariness and nullify the right to notice and hearing . . . The practice of going outside the record in search of bases for punishment must cease." 333 F.Supp. at 653-54.

The Court in *Wolff* did say that "when personal or institutional safety are so implicated," the required statement of the evidence relied on may omit certain items. 418 U.S. at 565. But this is obviously the exception and not the rule. It is one thing to authorize the non-disclosure of informants for their protection, but it is quite another for the triers of fact to consider information casually "passed on" by other prisoners or to consult off the record with guards and other officials. Disciplinary hearings would be a sham if the decisionmakers were authorized routinely to make *ex parte* determinations on evidence kept secret from the accused.

Indeed, petitioners' Plan pending before the district court—the Plan under which they have been operating in recent years—provides that a guilty finding may be made only on the basis of a preponderance of the evidence "*presented at the hearing*" (R296) (emphasis added). See also *In re Prewitt*, 8 C.3d 470, 503 P.2d 1326 (1972) (requiring disclosure of evidence when parole rescission is at stake at the hearing). The officials have presented no evidence that this interferes in any respect with any correctional interest. If on remand petitioners wish to amend their Plan to create a narrow exception for non-disclosure of informants, they are free to do so. But petitioners have not presented any justification for a gross departure from the due process precept that the case against the accused must be disclosed and the fact-finder may not rely on *ex parte* evidence.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed. Under that decision, the case will be remanded to the district court for further proceedings, including consideration of the specifics and actual operation of the disciplinary Plan proposed by petitioners.

Respectfully submitted,

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